Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1998

FRIEDERIKE MONIKA ADSANI,

Petitioner,

vs.

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC.; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GEORGE RUTHERGLEN
580 Massie Road
Charlottesville, Virginia
22903-1789
(804) 924-7015

ROBERT F. HERRMANN
Counsel of Record

CHERYL L. DAVIS
MENAKER & HERRMANN LLP
10 East 40th Street
New York, New York 10016
(212) 545-1900

Counsel for Petitioner

51 pp

QUESTION PRESENTED

Whether a district court can increase the financial barrier to appeal and thereby insulate its decisions from appellate review by including attorney's fees in the amount of a bond for "costs on appeal," contrary to the rulings of at least two circuits?

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PETITION FOR WRIT OF CERTIORARI

Friederike Monika Adsani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 6a) is reported at 139 F.3d 67 (2d Cir. 1998). The opinion of the district court (App., *infra,* 1a) is reported at 1996 U.S. Dist. LEXIS 17548, 41 U.S.P.Q.2d (BNA) 1154 (S.D.N.Y. 1996).

JURISDICTION

The court of appeals issued its judgment on February 23, 1998 (App., *infra*, 30a). The petitioner's request for rehearing with suggestion for rehearing in banc was denied on April 23, 1998 (*id.*, 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 7 of the Federal Rules of Appellate Procedure provides:

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

Rule 39 of the Federal Rules of Appellate Procedure provides in relevant part:

> (a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.
>
> * * *
>
> (c) *Costs of Briefs, Appendices, and Copies of Records.* By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable. Such rate shall not be higher

than that generally charged for such work in the area where the clerk's office is located and shall encourage the use of economical methods of printing and copying.

* * *

(e) *Costs on Appeal Taxable in the District Courts*. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for costs of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Section 505 of the Copyright Act, 17 U.S.C. § 505, provides:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or any officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

STATEMENT

The district court in this case imposed a bond of $35,000 as a precondition for petitioner Adsani to appeal from the summary judgment dismissing her complaint. This is the largest such bond ever reported.

Adsani, the author of an unpublished memoir entitled CINDERELLA IN ARABIA, had sued respondents in the Southern District of New York for copyright infringement, common law misappropriation of ideas and unjust enrichment for publishing a work entitled PRINCESS: THE TRUE STORY OF LIFE BEHIND THE VEIL IN SAUDI ARABIA and a sequel entitled PRINCESS: SULTANA'S DAUGHTERS. Adsani also claimed breach of fiduciary duty against respondents Miller and PMA, who served as literary agents for both Adsani and respondent Sasson. After limited pretrial discovery, the district court granted respondents' motions for summary judgment and awarded respondents $107,993.39 in attorney's fees (App., *infra*, 2a).[1]

After Adsani filed her notice of appeal from the judgment, respondents moved for a bond to cover costs on appeal under Federal Appellate Rule 7. The district court granted the motion and ordered a bond of $35,000, including prospective attorney's fees respondents might win if they prevailed on the appeal (App., *infra*, 5a). Adsani appealed from this bonding order and sought to consolidate the appeal with her appeal from the judgment. The court of appeals, however, denied the motion for consolidation, requiring instead that the appeals be heard *seriatim*, with the Rule 7 appeal first.

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[1] The district court had previously imposed a bond for costs in the amount of $50,000 in connection with the pretrial proceedings. When judgment was entered awarding respondents $107,993.39 in attorney's fees, respondents promptly executed on that bond because Adsani could not afford to post a supersedeas bond pending appeal.

On February 23, 1998, the court of appeals affirmed the order requiring a $35,000 bond as a precondition to Adsani's appealing on the merits (App., *infra*, 29a). The court found that a district court has the discretion to include attorney's fees in the bond if it determines that a particular appellant "poses a payment risk" and that for such court to engage in "pre-judging the case's chances on appeal" from its own decision was simply "part and parcel of Rule 7" (*id.*, 28a).

The court of appeals acknowledged the existence of a split in the circuits as to whether the "costs" referred to in Rule 7 included attorney's fees. The Third and D.C. Circuits had ruled against such inclusion in *Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 WL 307777 (3d Cir. 1997) and *In re American President Lines*, 779 F.2d 714 (D.C. Cir. 1985), both finding that the "costs" in Rule 7 encompass only those costs that are spelled out in Appellate Rule 39. In contrast, the First Circuit in *Sckolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987), had allowed attorney's fees in a Rule 7 bond, relying on Appellate Rule 38 (App., *infra*, 15a – 17a).

The court of appeals also rejected due process and equal protection challenges to the size and scope of the bond. While agreeing that "[g]overnment's power to 'close its courts' by imposing fees upon appeal . . . is not unlimited, and may be invalid either facially or as applied," the court concluded that there was no violation of the right to appeal in the circumstances of this case (App., *infra*, 24a – 28a).

On April 23, 1998, the court of appeals denied Adsani's motion for rehearing and suggestion for rehearing in banc (App. *infra*, 32a). Adsani then moved to hold in abeyance her appeal from the judgment pending disposition of this petition for a writ of certiorari with respect to the bonding order. On June 2, 1998, the court of appeals denied Adsani's motion and on July 1, 1998, ordered her to post the $35,000 bond within thirty days, on pain of dismissal with prejudice if she failed to do so (*id.*, 33a). Adsani is unable to post a $35,000 bond. Accordingly, by the date this petition is considered, the

appeal from the judgment will have been dismissed with prejudice for her failure to satisfy the lower court's bonding requirement, thereby magnifying the adverse effect of the order requiring the bond.[2]

REASONS FOR GRANTING THE PETITION

The rulings of the courts below raise fundamental issues concerning the allocation of authority in the federal judicial system. First, by granting the district court the discretion to increase the amount of a Rule 7 bond by including attorney's fees, the Second Circuit has allowed the district court to create a financial obstacle to appellate review of its own decisions. Second, the court has misconstrued the function of Rule 7 and its relationship to the definition of costs in Rule 39, sharpening a split in the circuits. And third, the court has misread this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), creating confusion over the term "costs" in procedural statutes.

I. The Court of Appeals' Interpretation of Rule 7 Impermissibly Empowers the District Courts to Insulate Their Judgments from Appellate Review.

The Second Circuit's reading of Rule 7 means that the district courts may, in their discretion, impose a bond large enough to place an appeal from their own decisions out of the reach of any appellant of ordinary means. The district court here achieved precisely that result by fixing the bond at $35,000, most of which comprised respondents' projected

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[2] The dismissal of the appeal raises no issue of mootness. On the contrary, the dismissal for failure to post the bond depends upon the validity of the order imposing the bond. The bonding order now determines the outcome of the appeal from the judgment and thus of the entire case.

attorney's fees. Yet, as the court of appeals conceded (App., *infra*, 24a), Adsani had a right to appeal the underlying judgment as a matter of law. 28 U.S.C. §1291, 1295(a)(1). That right may not be defeated by an order that in effect bars its exercise. *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) ("[a] court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered."), quoting *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966).[3]

By allowing the district courts to constrain appeals from their own decisions, the Second Circuit's ruling turns a blind eye to an appearance of impropriety in judicial administration. A district judge should not be able to insulate otherwise appealable orders any more than he or she can sit on a panel that hears the appeal. *See* 28 U.S.C. § 47; *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 343-44 (1913). This flows from the principle that a judge should avoid the appearance of having an interest in the outcome of a proceeding in which that judge is presiding. *In re Murchison*, 349 U.S. 133, 136 (1955).

The court below also erred in its view of the district court's role in the federal court system in pre-screening appeals for merit. Rules 7 and 39 confer no power on a district court to incorporate into the bonding process an assessment as to whether an appeal has merit or not. In the words of the D.C. Circuit:

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[3] *See also In re American President Lines*, 779 F.2d at 718 (rejecting inclusion of attorney's fees in Rule 7 bond because it might encumber the right to appeal); *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190 (5th Cir. 1979) ("[a] supersedeas bond should not be used as a penalty for a party availing itself of its appeal rights"); *Page v. A.H. Robins Co., Inc.*, 85 F.R.D. 139, 140 (E.D. Va. 1980) ("Requiring too large a bond may have the undesirable effect of discouraging meritorious appeals").

> Excessive bond . . . is not an acceptable control. While, in the federal scheme, appeals found to be frivolous cannot command judicial respect, those possessing merit are normally a matter of right. Courts accordingly must be wary of orders, even those well-meaning, that might impermissibly encumber that right.

779 F.2d at 718. The question of whether an appeal is meritless belongs to the courts of appeals, not to the district courts. *See* Fed. R. App. P. 38.[4] The Second Circuit's statement in this case that such "pre-judging" of an appeal's merit is "part and parcel of Rule 7" (App., *infra*, 28a) misconstrues the allocation of roles between district and appellate courts. The district court necessarily sets the amount of the bond under Rule 7 before the appeal is taken from its own decision. The court of appeals can award damages only later, after hearing the appeal, and only if it concludes that appellant's request for review of the district court's judgment was frivolous. The decision below has wrongly delegated the assessment of "frivolousness" to an inherently non-neutral authority.[5]

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[4] *See* note 7 *infra*.

[5] Such an interpretation of Rule 7, enabling district courts to control the amount of a costs bond as a means of deterring appeals pre-judged to be "frivolous," also raises serious questions of due process and equal protection. *See, e.g., Lindsay v. Normet*, 405 U.S. 56, 77-79 (1972) (condemning "double-bond" requirement in state statute).

II. The Second Circuit's Opinion Has Deepened the Split in the Circuits on the Issue of Whether a Rule 7 Bond May Include Attorney's Fees.

In *Hirschensohn* and *American President Lines*, the Third and D.C. Circuits faced the same issue as the Second Circuit did in this case. The Third Circuit held that "Rule 7 does not authorize a bond to cover the estimated costs of attorneys' fees." 1997 WL 307777, at *2. The D.C. Circuit held that the "costs" referred to in Rule 7 "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." 779 F.2d at 716 (citations omitted). The leading treatises also conclude that costs under Rule 7 are limited to those taxable under Rule 39.[6]

The Second Circuit has now departed from the prevailing view of Rule 7 "costs." The court noted the existence of a pre-existing split in the circuits as reflected in the First Circuit's opinion in *Sckolnick*, which had affirmed a district court's inclusion of attorney's fees in a Rule 7 bond on the authority of Federal Appellate Rule 38,[7] concerning frivolous appeals. 820 F.2d 13. The existence of this disarray among circuits apparently led the court here to reject the holdings in *Hirschensohn* and *American President Lines*.

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[6] *See, e.g.*, 16A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 3953 (2d ed. 1996) ("The costs secured by a Rule 7 bond are limited to the costs taxable under Appellate Rule 39. They do not include attorney's fees that may be assessed on appeal."); 20 J. Moore, *et al.*, MOORE'S FEDERAL PRACTICE, § 339.41 (3d ed. 1997) (attorney's fees not included as "costs" under Rule 39 or Rule 7).

[7] Rule 38 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." The term "just damages" encompasses attorney's fees, while "single or double costs" refers to the "costs" provided for in Appellate Rule 39. 20 J. Moore, *et al.*, MOORE'S FEDERAL PRACTICE, § 338.31, at 338-13.

The Second Circuit also separated itself in another respect from the views of other circuits in its treatment of Appellate Rule 39, governing costs. The court held that Rule 39 has no relevance to the delineation of costs for a Rule 7 bond because, in its view, Rule 39 does not "define costs" at all. According to the court, Rule 39 mentions each specific cost "only in the context of how that cost should be taxed, procedurally speaking" (App., *infra*, 18a). None of the provisions of the rule, said the court, "purports to define costs" (*id.*).

Every other circuit that has considered the function of Rule 39, however, has reached the opposite conclusion. *All* have found that Rule 39 "defines" the costs awardable on an appeal in the federal judicial system. *See, e.g., McDonald v. McCarthy*, 966 F.2d 112, 116 (3d Cir. 1992) ("Rule 39 defines costs as including normal administrative costs such as those incurred in preparing the record, filing fees, and the cost of the reporter's transcript").[8] The decision below therefore contradicts two circuits' holdings on the relationship between Rules 7 and 39, as well as the interpretation in at least six circuits of the scope and function of Rule 39.[9]

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[8] *Accord, Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 62 (1st Cir.) *rev'd and remanded on other grounds*, 436 F.2d 699 (1st Cir. 1970); *Chemical Mfrs. Ass'n v. U.S. Environmental Protection Agency*, 885 F.2d 1276, 1278 (5th Cir. 1989); *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 681-82 (6th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986); *Mills v. Freeman*, 118 F.3d 727, 735 n.5 (11th Cir. 1997); *In re American President Lines*, 779 F.2d at 716.

[9] The D.C. Circuit has made plain that *Montgomery & Assoc., Inc., v. CFTC*, 816 F. 2d 783, 784 (D.C. Cir. 1987) did not modify or overrule its holding in *American President Lines* that the term "costs" in Rule 39 excludes attorney's fees. *Singer v. Shannon & Luchs Co.*, 868 F.2d 1306, 1307-08 (D.C. Cir. 1989) *cert. denied*, 493 U.S. 822 (1989). The Second Circuit's footnoted statement to the contrary is incorrect. (App., *infra*, 16a).

III. The Second Circuit's Decision Conflicts with This Court's Decision in *Roadway Express* on When Attorney's Fees Are to Be Included within the Meaning of "Costs."

The Second Circuit's opinion misinterprets *Roadway Express* on the relationship between "costs" and attorney's fees. In *Roadway Express*, the Court found that the term "costs" in section 1927 of Title 28 of the United States Code[10] does not incorporate the provision for attorney's fees in the governing substantive statute, which in that case was 42 U.S.C. § 1988. 447 U.S. 752, 757-58.[11] This was because section 1927 is to be read with section 1920 of Title 28 as components of an integrated statute, for reasons of history and statutory construction. 447 U.S. at 759-60. Section 1920 is the provision of the Judicial Code that defines the costs that may be taxed in any civil case, and attorney's fees are not included in the costs there listed. It is also the statutory authorization for Appellate Rule 39, a fact which supports the previously settled view that Rule 39 does not include attorney's fees. *McDonald v. McCarthy*, 966 F.2d at 116; Fed. R. App. P. 39, Adv. Comm. Note, 43 F.R.D. 155 (1967).

The Second Circuit regarded the holding in *Roadway Express* as inapplicable to this case. Instead, the court looked to the subsequent decision in *Marek v. Chesny*, 473 U.S. 1, 8-9 (1985), which held that the term "costs" in Federal Rule of Civil Procedure 68 did in fact incorporate a right to

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[10] Section 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

[11] *Roadway Express* concerned a claim of discrimination under the civil rights statutes. The relevant attorney's fees provisions, 42 U.S.C. §§ 1988, 2000e-5(k), permit a prevailing plaintiff to recover attorney's fees "as a part of the costs," the same language used in 17 U.S.C. § 505.

attorney's fees from 42 U.S.C. § 1988. The majority in *Marek* had distinguished the statutory situation in *Roadway Express* by noting a basic difference between Rule 68 and 28 U.S.C. § 1927. The difference was that section 1927 "came with its own statutory definition of costs" (i.e., in section 1920) that did not include attorney's fees, while "Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case." 473 U.S. at 9, n.2.

The Second Circuit concluded that *Marek* should govern rather than *Roadway Express* for two reasons -- first, because in its view Rule 7 was not to be read in conjunction with Rule 39, in contrast with sections 1927 and 1920 of Title 28; and second, because the attorney's fees provision of the Copyright Act supposedly pre-existed the bonding requirement of Rule 7 (App., *infra,* 14a - 16a, 19a - 20a). Both reasons are mistaken. The leading commentators[12] as well as the Third and D.C. Circuits in *Hirschensohn* and *American President Lines* have stated that Rules 7 and 39 are to be read together.[13] And the history of the bond for costs now reflected in Rule 7 and the definition of costs covered in Rule 39 far antedate the enactment of the attorney's fees provision of the Copyright Act. The latter provision was enacted only in 1909.[14] In contrast, the

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[12] *See* note 6 *supra* and accompanying text.

[13] The Second Circuit distinguished *Hirschensohn* and *American President Lines* by rejecting this reasoning and instead arguing that neither of those cases involved a statute that authorized the award of attorney's fees. The factual accuracy of the court's distinction is questionable, since the district courts in both cases had included attorney's fees in an appeal bond based on statutory provisions. *Hirschensohn*, 1997 WL 307777, at *3 (V.I. Code Ann. tit. 5, § 541); *American President Lines*, 779 F.2d at 717 (Fed. R. App. P. 38). Moreover, both decisions followed *Roadway Express* in rejecting any definition of costs outside Rule 39, including statutes authorizing the award of attorney's fees. In not following *Roadway Express*, the decision of the Second Circuit in this case conflicts with those decisions.

[14] Section 40 to 1909 Copyright Act, 35 Stat. 1075, 1084.

connection between Rule 7 and the costs definition in Rule 39 can be traced all the way back to the founding of the federal judicial system.

Rule 39 was based on the statutory definition of costs in 28 U.S.C. § 1920. Fed. R. App. P. 39, Adv. Comm. Note, 43 F.R.D. 155. This definition of costs (which was at issue in *Roadway Express*) was originally enacted in 1853. 447 U.S. at 759-60. Without more, the history of Rule 39 brings the present case squarely within the holding of *Roadway Express*: a definition of costs, enacted when costs excluded attorney's fees, cannot now be expanded in the light of subsequent legislation that does not explicitly amend that definition. *Id.* at 760-61.

Rule 7 can be traced back even further than Rule 39, all the way to the First Judiciary Act. The immediate model for Rule 7 was the original version of Federal Rule of Civil Procedure 73(c). Fed. R. App. P. 7, Adv. Comm. Note, 43 F.R.D. 130 (1967).[15] Rule 73(c), in turn, was taken from 28 U.S.C. § 869 (1934) and Rev. Stat. § 1000 (1875). Fed. R. Civ. P. 73(c), Adv. Comm. Note (1938), reprinted at 28 U.S.C. App. page 5200 (1958 ed.). These statutes, insofar as they governed appeal bonds, adopted provisions first enacted

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[15] With the adoption of the Federal Rules of Appellate Procedure, the original version of Rule 73(c) was deleted from the Federal Rules of Civil Procedure and replaced by a rule on a different subject. In its original version, Rule 73(c) set the amount of the bond for costs on appeal at $250, unless otherwise ordered by the court. Fed. R. Civ. P. 73(c), Adv. Comm. Note, 1 F.R.D. cxxxviii (1941). This amount was plainly *not* enough to cover attorney's fees when original Rule 73(c) was adopted in 1937. The Second Circuit's implausible and unsupported assertion to the contrary (App., *infra*, 21a), is belied by the historical record. Specifically, when the Judicial Conference set standardized fees for the courts of appeals in 1946, the fee for printing the record could alone reach $250.00, with additional fees for docketing, copying and searching court records. New Schedule of Fees, 7 F.R.D. 1, 2 (1946). Moreover, this new schedule of fees represented a reduction of several hundred dollars on average from the pre-existing fees imposed by various circuits. *Id.* at 5.

in section 22 of the First Judiciary Act, Act of Sept. 24, 1789, 1 Stat. 84, and the Act of Dec. 12, 1794, 1 Stat. 404. The latter act amended the First Judiciary Act precisely in order to limit the amount of appeal bonds and, in particular, to limit such bonds to "costs" instead of "all damages and costs." [16] This Act removes any doubt that Rule 7 refers only to "costs" in the narrow and traditional sense presupposed by the "American Rule" on attorney's fees. Indeed, only two years later, this Court recognized the American Rule in denying an award of attorney's fees as costs. *Arcambel v. Wiseman*, 3 U.S. 306 (1796). Like the provision permitting an award of costs in *Roadway Express*, Rule 7 must be interpreted in light of the narrow and traditional definition of costs excluding attorney's fees.

The opinion below in this case reflects a misapprehension as to the scope of *Roadway Express* and *Marek v. Chesny* respectively. The issue addressed by those two leading decisions is recurring and important – whether the traditional, limited definition of costs in the Federal Rules of

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[16] The act in full reads as follows:

An Act to amend and explain the twenty-second section of "the act establishing the Judicial Courts of the United States."

Whereas by the twenty-second section of the act entitled "an act to establish the Judicial Courts of the United States," it is provided that "Every justice or judge signing a citation or any writ of error, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good." And whereas doubts have arisen as to the extent of the security to be required in certain cases:

Be it enacted and declared by the Senate and House of Representatives of the United States of America in Congress assembled, That the security to be required and taken on the signing of a citation on any writ of error, which shall not be supersedeas and stay execution, shall be only to such an amount, as in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.

Appellate Procedure has been modified by the various statutes that now shift attorney's fees to a losing party "as part of the costs." The opinion below has increased the confusion on this issue in the lower federal courts by misperceiving the continuing force and effect of the prior decisions of this Court.

CONCLUSION

The court below has, in its interpretation of Rule 7, arrogated to the district court a gatekeeping power that misallocates institutional authority in the federal appellate scheme. This result has created conflicts between the circuits as to both the scope of Rule 7 and the function of Rule 39, and it has obscured the guidance previously provided by this Court in *Roadway Express* and *Marek*. These are all issues of importance for the administration of justice. Accordingly, the Court should grant the writ.

FRIEDERIKE MONIKA ADSANI
Petitioner

ROBERT F. HERRMANN,
Counsel of Record

CHERYL L. DAVIS
MENAKER & HERRMANN LLP
10 East 40th Street
New York, New York 10016
(212) 545-1900

GEORGE RUTHERGLEN
580 Massie Road
Charlottesville, Virginia 22903-1789
(804) 924-7015

Counsel for Petitioner

July 21, 1998

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 9131 (DLC)

FRIEDERIKE MONIKA ADSANI,

Plaintiff,

-against-

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC.; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP,

Defendants.

MEMORANDUM OPINION AND ORDER

DENISE COTE, District Judge:

I. Background

Defendants Jean P. Sasson, William Morrow & Company, Inc., Avon Books, the Hearst Corporation, and Bantam, Doubleday, Dell Publishing Group, Inc., applied to this Court, in a letter dated October 29, 1996, for security costs for the appeal of this Court's dismissal of plaintiff's complaint alleging a copyright violation. Defendants Peter Miller and PMA Literary and Film Management, Inc. joined in this application in a letter erroneously dated October 9, 1996. Defendants request the Court, pursuant to Rule 7 of the Federal Rules of Appellate Procedure, to require the plaintiff-appellant to file a bond or provide other security to ensure payment of the costs on appeal, including attorney's fees.

II. Facts

Plaintiff is a foreign resident without assets in the United States. Additionally, plaintiff has not paid the judgment imposed by this Court on September 19, 1996. In that opinion and order, this Court dismissed plaintiff's complaint with prejudice and awarded defendants $107,993.39 in costs and attorney's fees pursuant to section 505 of the Copyright Act, having found that the copyright claim was objectively unreasonable. Plaintiff did not file a supersedeas bond to stay enforcement of the judgment, pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. Defendants requested plaintiff to pay the judgment voluntarily. Plaintiff declined. As a result, defendants have notified the bond company that filed the $50,000 security bond for the district court proceedings and have begun enforcement proceedings against the plaintiff.

III. Discussion

Defendants request this Court to require plaintiff to file a bond to cover the costs of appeal. Defendants request that the amount of such bond be sufficient to include the award of attorney's fees on appeal. The parties disagree as to whether Rule 7's reference to "costs on appeal" includes attorney's fees. Additionally, plaintiff contends that defendants should have made a formal motion to request the appeal bond, and therefore this Court should disregard the informal letter application. I find that I have the authority to require plaintiff to file a bond to cover both the costs of appeal as well as attorney's fees.

In relevant part, Rule 7 of the Federal Rules of Appellate Procedure states that

> [t]he district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Rule 39 of the Federal Rules of Appellate Procedure lists those costs that constitute the "costs of appeal." An award of attorney's fees is not listed among these costs.

Defendants may indeed win an award of attorney's fees if plaintiff does not win her appeal. The Second Circuit, quoting a leading treatise, stated that in a suit brought under the Copyright Act "an award of attorney's fees may be made for services rendered on appeal as well as at the trial level." *Twin Peaks Prod., Inc., v. Publications Int'l. Ltd.*, 996 F.2d 1366, 1383 (2nd Cir. 1993) (quoting 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 14.10[E], at 14-129). The question at issue here, however, is whether I may require plaintiffs to post a bond to cover these attorney's fees in the eventuality that defendants do win on appeal and then win an award of attorney's fees.

Defendants argue that attorney's fees are included in the "costs" envisioned by Rule 7 because Section 505 of the Copyright Act includes attorney's fees as part of costs. Defendants contend that the "costs" referred to in Rule 39 should be defined by the underlying substantive statute. If the statute permits an award of attorney's fees, they argue, then the term costs includes such an award.

While the Second Circuit has not addressed this issue, seven other circuits have determined that "costs," as defined by Rule 39, does not include attorney's fees even when the underlying statute does permit such an award. *See McDonald v. McCarthy*, 966 F.2d 112, 116 (3rd Cir. 1992) (holding that § 1988 award of attorney's fees not included in rule 39 costs); *Chemical Mfrs. Ass'n v. United States EPA*, 885 F.2d 1276, 1278 (5th Cir. 1989) (order that each party bear its own costs on appeal not a denial of attorney's fees under Clean Water act); *Lattimore v. Oman Constr.*, 868 F.2d 437, 440 n.6 (11th Cir. 1989) (appellant court order that each party bear its own costs not bar to attorney's fees); *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 681 (6th cir. 1985) (en banc) (finding an award of costs under rule 39 "separate and distinct from and totally unrelated to an award

of attorney's fees" under § 1988); *Northern Plains Resource Council v. United States EPA*, 670 F.2d 847, 848 n.1 (9th Cir. 1982) (attorney's fees recoverable under Clean Air Act not tantamount to costs under Rule 39), *vacated on other grounds*, 464 U.S. 806 (1983); *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980) (award of Rule 39 costs did not include award of attorney's fees, even though available under §1988); *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 91 (1st Cir. 1970) (order that no costs be awarded on cross appeals does not preclude motion for attorney's fees under Clayton Act).

While attorney's fees are not automatically part of costs under Rule 39, it is not unprecedented for a district court to require an appellant to post a bond for costs on appeal that include attorney's fees as part of those costs. *See Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (upholding district court's requirement of bond to cover costs and attorney's fees in appeal of discrimination suit where appellees might win attorney's fees due to potentially frivolous nature of the appeal).

Additionally, a court in this district defined Local Rule 39, which allows a court to require a litigant to file a bond to cover "costs" at the trial level, to include attorney's fees as part of these costs even though Local Rule 39 did not refer to attorney's fees. *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 36 (S.D.N.Y. 1989). There, the court reasoned that since one of the underlying statutes in the action – the Copyright Act – allowed for attorney's fees as part of costs, the bond for costs should also include attorney's fees.

While I do not find that the "costs" provision of Rule 39, Fed. R. App. P., should be read to include attorney's fees, I do find that I have the authority to require plaintiff to file a bond that would cover both costs and attorney's fees from the appeal. Moreover, I find such a bond necessary given plaintiff's failure to post a supersedeas bond and her lack of assets in the United States. Failure to require a bond may

render any award of attorney's fees by the Court of Appeals, should it determine that such an award is appropriate, a nullity.

Given the apparent novelty of this issue in this Circuit, I will stay the imposition of this order for two weeks to give plaintiff the opportunity to appeal this ruling to the Second Circuit and for that Court to review this decision if it desires. This two-week stay will also give plaintiff the opportunity to arrange to file a bond for the appeal of the copyright claim, should she choose to do so.

Finally, I find nothing in the law that requires a party to make a formal motion to this court to apply for an appeal bond. The parties have been given a full opportunity to make written presentations to the Court on this issue and to respond to each others' submissions.

For the above reasons, it is hereby

ORDERED that the plaintiff file a bond in the amount of $35,000 to cover the costs of appeal and a possible award of attorney's fees associated with that appeal.

IT IF FURTHER ORDERED that this ruling will be stayed for two weeks.

SO ORDERED:

Dated: New York, New York
November 19, 1996

Denise Cote
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1996

(Argued: June 10, 1997) (Decided Feb. 23, 1998)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.
96-9593

FRIEDERIKE MONIKA ADSANI,

Plaintiff-Appellant,

-against-

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC.; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP,

Defendants-Appellees.

BEFORE: OAKES and PARKER, *Circuit Judges*,

And NICKERSON, *District Judge*.*

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* The Honorable Eugene H. Nickerson, of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from a post-judgment order of the United States District Court for the Southern District of New York (Denise Cote, *Judge*) directing plaintiff to file a $35,000 bond pursuant to Federal Rule of Appellate Procedure 7 for costs and attorney's fees that may be awarded on appeal. We address this issue de novo as a matter of law not yet decided by this Court.

We affirm.

Richard G. Menaker, New York, NY (Cheryl L. Davis, Menaker & Herrmann LLP, New York, NY, Bruce K. Lagerman, Lagerman & Associates, P.C., Reston, VA, of counsel), *for Plaintiff-Appellant.*

Richard Dannay, New York, NY (David O. Carson, Schwab Goldberg, Price & Dannay, New York, NY, of counsel), *for Defendants-Appellees* Jean P. Sasson, William Morrow & Company, Inc., Avon Books, The Hearst Corporation and Bantam Doubleday Dell Publishing Group, Inc.

Carl E. Person, New York, NY (letter brief), *for Defendants-Appellees* Peter Miller and PMA Literary and Film Management, Inc.

PARKER, *Circuit Judge*:

Friederike Monika Adsani, a resident of the United Kingdom with no assets in the United States, appeals a post-judgment order of the District Court for the Southern District of New York (Denise Cote, *Judge*) dated November 19, 1996, directing her to post a bond of $35,000 to cover the costs and attorney's fees upon appeal pursuant to Rule 7 of the Federal Rules of Appellate Procedure. The bond order arose from her appeal of a judgment entered September 25, 1996 granting summary judgment and dismissing the complaint as to defendants Peter Miller and PMA Literary and Film Management, Inc. ("PMA") and an order entered April 23, 1996 granting summary judgment and dismissing the complaint as to the remaining five

defendants, Jean P. Sasson, William Morrow & Company, Inc. ("Morrow"), Avon Books ("Avon"), The Hearst Corporation ("Hearst"), and Bantam Doubleday Dell Publishing Group, Inc. ("Bantam"), the merits of which will be addressed in a separate appeal *seriatim* by previous order of this Court entered January 17, 1997, granting Adsani's motion for consolidation.

I. BACKGROUND

Adsani is a resident of the United Kingdom with no assets in the United States. She is the author of, and holds the copyright in, a manuscript version of her unpublished autobiography entitled CINDERELLA IN ARABIA or CINDERELLA IN KUWAIT ("CINDERELLA"), a memoir of time she spent in the Middle East. The manuscript recounts the oppressiveness of her Arab husband and the brutal treatment of women in traditional Middle Eastern culture.

Adsani alleges that defendant Miller (Adsani's literary agent as well as literary agent to defendant Jean P. Sasson) had access to her manuscript and conspired with Sasson and the defendant publishers to publish a comprehensive, non-literal copy of her work under Sasson's name entitled PRINCESS: A TRUE STORY OF LIFE BEHIND THE VEIL IN SAUDI ARABIA ("PRINCESS"), as well as a sequel entitled PRINCESS: SULTANA'S DAUGHTERS (both of which became best sellers). Adsani theorizes that the defendants favored Sasson's work because Sasson was more famous than she. Adsani supported these allegations with (1) an affidavit of testimony of an industry professional; (2) a time-frame in which Sasson could have plagiarized her work; and (3) excerpts from her expert witness's report, which detail numerous purported similarities between *Cinderella* and *Princess*.

On December 21, 1994, Adsani brought a copyright infringement claim, along with related state law claims of misappropriation of ideas and unjust enrichment; she also claimed breach of fiduciary duty against defendants Miller and PMA.

Early in the litigation, the defendants requested a bond to cover attorney's fees to which they might be entitled under 17 U.S.C. §505. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The district court granted this request, ordering Adsani to post a bond of $10,000. Adsani complied. During discovery, the court later amended this order to make the bond $50,000. Again, Adsani complied. Then, on April 19, 1996, the court granted summary judgment to the defendants on the copyright infringement and unjust enrichment claims. The state claim of misappropriation of ideas as against Sasson was also dismissed. The state claims of misappropriation and breach of fiduciary duty against Miller and PMA were not dismissed. Pursuant to Fed.R.Civ.P. 54(b), Judge Cote entered partial judgment in favor of defendants Sasson, Morrow, Avon, Hearst and Bantam. This left only Miller and his agency, PMA, in the suit.

Subsequently, Miller and PMA moved for summary judgment, Adsani moved for reconsideration of the dismissal of misappropriation claims against Sasson, and all of the defendants moved for attorney's fees pursuant to 17 U.S.C. §505. By opinion and order entered September 23, 1996 (and corrected opinion and order entered September 24, 1996), the district court granted summary judgment in favor of Miller and PMA, rejected Adsani's motion to reconsider, and granted attorney's fees to the defendants, in the amount of $11,448.25 for Miller and PMA, and $96,545.14 for defendants Sasson, Morrow, Avon, Hearst, and Bantam (a total of $107,993.39).[1]

The district court granted defendants' attorney's fees on the ground that Adsani's claim had been "objectively unreasonable." The defendants placed a demand for payment with Adsani's bonding company, and were paid $50,000 by the company a few months later. Adsani did not oppose enforcement of judgment for the remaining $57,993.39 in

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[1] Final judgment on these orders was entered on September 25, 1996, dismissing the complaint with prejudice.

attorney's fees nor did she make payment on this remaining sum. She also made no attempt to stay enforcement of judgment through posting a supersedeas bond.

Adsani filed a timely Notice of Appeal, and the defendant moved the district court to require Adsani to post a bond pursuant to Fed. R. App. P. 7.[2] The district court granted this motion, requiring Adsani to post a bond of $35,000 "to cover the costs appeal and a possible award of attorney's fees associated with that appeal." The district court found that such a bond was necessary because Adsani had no assets in the Untied States and she gave supersedeas bond for the district court's approval to stay enforcement of the judgment,

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[2] The Federal Rules of Appellate Procedure use the term "supersedeas bond" as something distinct from a "cost bond." *Compare* Rule 7 (regarding bonds "to ensure payment of costs") *with* Rule 8 (regarding *inter alia* "supersedeas bonds"). *See also*, Fed. R. App. P. 8, Advisory Committee Notes, 1967 Adoption (noting that "[t]here appears to be no reason why matters relating *supersedeas and cost* bonds should not be initially presented to the district court..." (emphasis added)). However, BLACK'S LAW DICTIONARY cites both Rule 7 and Rule 8 in its definition of "supersedeas bond": "A bond required of ne who petitions to set aside a judgment or execution and from which the other party may made whole if the action is unsuccessful." BLACK'S LAW DICTIONARY 1438 (6th ed. 1990); *see also* Fed. R. Civ. P 62(d). It cites only Rule 7 in its definition of "cost bond," also known as an "appeal bond." *Id.* at 346. In addition, "supersedeas" refers to the name of the writ containing a command to stay proceedings at law, suspending the power of the trial court to execute on the judgment appealed from. *See Id.* at 1437-38 (6th ed. 1990); *see also Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 63 F.2d 755, 758 (D.C. Cir. 1980) (discussing the nature of supersedeas bond under Rule 8 and former Rule 73(d)). Wright & Miller instruct that cost bonds and supersedeas bonds "should not be confused..." Wright, Miller & Cooper, 16A *Federal Practice and Procedure: Jurisdiction 2d* § 3953 at 278 (1996). It appears that a "supersedeas bond" is retrospective covering sums related to the merits of the underlying judgment (and stay of its execution), whereas a "cost bond" is prospective relating to the potential expenses of litigating an appeal. *See The Astoria v. Slayne*, 1 F.R.D. 742, 743 (E.D.N.Y. 1941) ("The bond filed was merely a cost bond and not a supersedeas bond and was intended to cover costs in the appellate court only." (citations omitted)).

pursuant to Rule 62(d), Fed. R. Civ. P. Judge Cote, however, stayed the imposition of the post-judgment bond order for two weeks to give Adsani the opportunity to appeal her ruling. Adsani filed a notice of appeal of the Rule 7 order as well as the judgment dismissing on the merits.

Adsani moved in the district court for an extension of the stay of enforcement, but was denied. On December 4, 1996, Adsani moved this Court for an order vacating the Rule 7 bond or, in the alternative, consolidating the appeal from the Rule 7 order with the merits appeal. The defendants opposed the consolidation. On January 14, 1997, this Court heard oral argument on the motion and, on January 17, 1997, issued an order granting defendant's requirement that the appeals be heard *seriatim*, with the Rule 7 appeal first. This is the appeal of the Rule 7 order.

II. DISCUSSION

A. *Rule 39's Relationship with Rule 7*

Ordinarily, we would review the district court's post-judgment order pursuant to Rule 7 for abuse of discretion. *See Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n,* 636 F.2d 755, 757 n.2 (D.C. Cir. 1980) (Rule 7 "leaves the requirement of an appeal bond to the district court's discretion ..."). Since, however, this appeal challenges the extent and type of costs allowable under Rule 7, we review de novo to settle a question of law. S. Childress & M. Davis, FEDERAL STANDARDS OF REVIEW § 2.13 at 2-92 (2d ed. 1986).

The federal rules provide that a district court "may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case." Fed. R. App. P. 7. Adsani argues that the definition of "costs" in Rule 7 should be supplied by Rule 39, Fed. R. App. P., which lists certain costs but makes mention of attorney's fees. Thus, argues Adsani, the district court erred when it required her to post a bond for an amount that included fees.

The defendants-appellees, on the other hand, assert principally that Rule 39's definition of costs is irrelevant, and should not be imported into Rule 7. They argue, first, that Rule 7 allows the district court to require an appellant to post a bond to cover "costs." Second, Rule 7 does not define "costs." Third, the Copyright Act provides for the award of attorney's fees (including fees associated with appeals) to a prevailing party "as part of the costs." 17 U.S.C. § 505; *see e.g.* , *Twin Peaks Prods., Inc. v. Publications Int'l., Ltd.*, 996 F.2d 1366, 1383 (2d Cir. 1993) (holding that in a suit brought under the Copyright Act "an award of attorney's fees may be made for services rendered on appeal as well as at the trial level.") (quoting 3 M.B. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 14.10[E], at 14-129). Therefore, defendants-appellees argue, an appellant in copyright litigation may be required to post a bond that includes the appellee's estimated attorney's fees on appeal.[3]

Adsani relies on *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). There, the plaintiffs brought a civil rights class action, but failed to respond to court deadlines and were generally slow and uncooperative in their prosecution of the case. The district court sanctioned the plaintiff's attorneys, requiring them to pay defendant Roadway's costs and attorney's fees for the entire lawsuit. *Id.* at 756. The district court grounded its ruling in the confluence of several statutes. The applicable civil rights statues, 42 U.S. §§ 1988, 2000e-5(k), allow the prevailing party to recover attorney's fees "as a part of costs." *Id.* Section 1927 of Title 28 of the United States Code permits a court to tax the excess "costs" of a proceeding against an attorney who multiplies proceedings

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[3] The district court neither explicitly accepted nor rejected this last argument. Nor did it cite any of the authority on which it relied when including estimated attorney's fees in the order. It stated only the following: "While I do not find that the 'costs' provision of Rule 39, Fed. R. App. P., should be read to include attorney's fees, I do find that I have the authority to require plaintiff to file a bond that would cover both costs and attorney's fees from the appeal."

needlessly.[4] *Id.* Therefore, because this was a civil rights case, the defendant's attorney's fees could be taxed against the plaintiffs' lawyers under section 1927. *Id.* The Fifth Circuit affirmed the finding that the plaintiffs' attorneys had violated section 1927, but reversed the imposition of attorney's fees.[5] *Id.* at 756-57.

The Supreme Court disagreed with the reasoning of the district court. It noted that courts had generally construed section 1927 in conjunction with section 1920, which enumerates the costs that ordinarily are taxed to a losing party in federal court (and which does not include attorney's fees), and that the common understanding of the term "costs" at the time that section 1927 was enacted in 1813 was one that did not include attorney's fees. *Id.* at 757-78. Moreover, because section 1927 was "re-enacted" in 1853 along with section 1920, the two sections "should be read together as part of the integrated statute approved in 1853" that provided for uniform treatment of costs in federal courts. *Id.* at 760. Roadway argued that Congress's intent in putting counsel fee provision in civil right statutes should control. The Court responded that what controlled was the use of the term "costs" contemporaneous with the re-enactment of section 1927 and section 1920, rather than retroactively importing the definition of "costs" from the civil rights statues, passed much later, after the Civil War. *Id.* at 759. The Court presumed that, in 1813 (and 1853), Congress followed the "American rule," that attorney's fees are not ordinarily part

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[4] Note that section 1927 did not at the time include any language regarding attorney's fees. This amendment was made after *Roadway Express* was decided.

[5] The Fifth Circuit based its ruling on the fact that section 1927 subjected *attorneys* to costs whereas the civil rights statues subjected *parties* to costs, which included attorney's fees. These facts would seem to make *Roadway* inapplicable to the case at bar. The Supreme Court, however, while discussing the different cost-bearers intended by the statutes, grounded its analysis in *Roadway* on the interpretation of the term "costs" contemporaneous to the passage of the statute. This approach is very salient to our discussion of "costs" allowable under Rule 7.

of the costs granted to a prevailing litigant, when it passed section 1927. *Id.* Therefore, the Court affirmed the Fifth Circuit's holding that attorney's fees could not be imposed under section 1927. The case was then remanded on other grounds.

The defendants rely on *Marek v. Chesny*, 473 U.S. 1 (1985). There, the plaintiff sued a police officer under 42 U.S.C. § 1983 and state tort law. Prior to trial, the defendant offered a settlement of $100,000, which the plaintiff rejected. At trial, a jury awarded the plaintiff $60,000. *Id.* at 4. Plaintiff then filed a request for $171,692.47 in attorney's fees pursuant to 42 U.S.C. § 1988. The defendants objected on the theory that attorney's fees are "costs" within Fed. R. Civ. P. 68, which provides that a party will not be liable for costs incurred after an offer of settlement is made and rejected, if the final amount awarded to the party that rejected the settlement is less than the proffered settlement. The defendant argued that he should only have to pay $32,000, which was the amount of the attorney's fees that had accrued prior to the defendant's offer. The district court agreed. The court of appeals, however, reversed. And, the Supreme Court reversed the Court of Appeals, affirming the district court.

The Court noted that at the time of the adoption of the Federal Rules of Civil Procedure in 1937 the "American Rule" had, in several federal statues, become "subject to certain exceptions," and that "[t]the authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions." *Id.* at 8. The Court gave several examples of such statutes, including the Copyright Act. The Court then stated the following:

> Against this background of varying definitions of "costs," the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.
>
> In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere

> oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Id. at 8-9. This approach was consistent, the Court stated, with the plain meaning of the statute and rule, and with the rule's policy of encouraging settlement. *Id.* at 10. The Court distinguished *Roadway Express*, in a footnote, on the ground that the statute at issue in *Roadway Express* came with its own statutory definition of costs, and that rule 68 did not. *Id.* at 9 n.2.

The Federal Rules of Appellate Procedure, including Rule 7, were transmitted to Congress by the Chief Justice of the United States on January 15, 1968 and became effective on July 1, 1968. Further, Rule 7 was amended effective August 1, 1979. The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs. *See Marek*, 473 U.S. at 8. Thus, the drafters of Rule 7, Fed. R. App. P. – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees "as part of the costs" when drafting Rule 7 and not defining costs therein. *See* 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Three circuit-level cases touch upon the issue of whether Rule 39 supplies the definition of "costs" to Rule 7, without addressing the effect of a separate statute authorizing attorney's fees "as part of the costs" upon appeal. In *In re American Presidential Lines, Inc.*, 779 F.2d 714 (D.C. Cir.

1985), the court stated that "[t]he costs referred to [in Rule 7] are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorney's fees that may be assessed on appeal." *Id.* at 716 (footnotes and citations omitted). However, the court cites no case law that directly supports this proposition. Furthermore, unlike this case, there was no statute authorizing an award of attorney's fees "as part of the costs." The holding in *American Presidential Lines* comports with the usual practice in the United States that a prevailing party is not entitled to recover attorney's fees as "costs" in the absence of a statute allowing such an award. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Therefore, the case does not directly support plaintiff-appellant's case.[6]

Next, in *Scholnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987) (per curiam), the First Circuit affirmed the district court's imposition of a Rule 7 bond in the amount of $5,000 on a litigious *pro se* plaintiff who sued the defendants under 42 U.S.C. §§ 3612 and 3617 and lost at summary judgment. The First Circuit noted "that defendants' motion below requesting a bond sought security for the costs, *including attorney's fees*, which may be awarded by the Court of Appeals...pursuant to Fed. R. App. P. 38 and 39." *Id.* at 15 (emphasis added). Further, the First Circuit found that "the district court's decision to set the amount at $5,000 implied a view that the appeal might be frivolous and that an award of

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[6] In addition, the seemingly absolute rule announced in *Presidential* either has been modified by or has been overruled implicitly by *Montgomery & Assocs. v. CFTC*, 816 F.2d 783, 784 (D.C. Cir. 1987). In *Montgomery*, the D.C. Circuit held that "costs" in Rule 39 may include attorney's fees subject to the rule's time limits where the substantive statute upon which the appeal is based includes the recovery of attorney's fees "as part of the costs" *Id.* at 784; *accord Singer v. Shannon & Luchs Co.*, 868 F.2d 1306, 1307 (D.C. Cir. 1989) (per curiam) (noting in dicta the circuit's previous holding that attorney's fees under 42 U.S.C. § 7607(f), which were defined to be part of costs, were *not* subject to Rule 39(d)'s time limit) (citing *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 5-6 (D.C. Cir. 1982)). Thus, in light of *Montgomery*, *Presidential* provides an ambiguous precedent of little authority.

sanctions against plaintiff on appeal was a real possibility." *Id.* The appellate court held that the district court did not abuse its discretion in judging the appeal to be frivolous. *Id.* The *Sckolnick* case also lacked any statute authorizing attorney's fees as part of the costs. The decision demonstrates, however, that the First Circuit interprets Rule 7 to permit a bond which sought security for a possible sanction in the form of attorney's fees upon appeal. By implication, "costs" under Rule 7 would not exclude attorney's fees as a blanket rule for that court.

A third, unreported decision touches on the relationship between Rule 7 and Rule 39. In *Hirschenson v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 (3d Cir. June 10, 1997) (per curiam), the court addressed "whether anticipated attorney's fees, which are available under Virgin Island law, may be considered as 'costs' on appeal and the subject of an appeal bond." *Id* at *1. The Third Circuit found that "costs" under Rule 39 do not include attorney's fees, *id.* at *2, and that "Rule 7 does not authorize a bond to cover estimated costs of attorney's fees." *Id.* at *3. The court, however, based its ruling on attorney's fees that were assessed as part of Virgin Islands law, not federal law. In fact, the Third Circuit found that this Virgin Islands law did "not authorize assessment of counsel fees on appeal to this Court." *Id.* Thus, *Hirschensohn* does not address the case where, as here, an independent federal statute explicitly authorizes attorney's fees "as part of the costs" both at trial and upon appeal which permits a district court to order a Rule 7 appeal bond including such costs.

The principal dispute here is over Rule 39's relevance to the question of what the term "costs" in Rule 7 means. Adsani argues, first, that Rule 39 defines "costs" for the Federal Rules of Appellate Procedure, and, second, that this definition should be used in Rule 7. Adsani's argument fails because she is wrong on the first point: Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure.

Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring "such costs"[7] may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. *See* Fed. R. App. P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

We read *Marek* to support the view that Rule 39 does not exhaustively define "costs." There, the Supreme Court construed the meaning of the same word – "costs" – in a Rule of Civil Procedure rather than a Rule of Appellate Procedure. The Federal Rules of Civil Procedure also have a Rule devoted to procedures relating to costs, Fed. R. Civ. P. 54(d), but this Rule played no part in the Supreme Court's analysis in *Marek*.[8] Adsani argues that Rule 7 has, in Rule 39, a "pre-existing definition of costs," and therefore is more akin to *Roadway Express* than *Marek*, but Rule 7 does not have a pre-existing definition of costs any more than Fed. R. Civ. P. 68, the rule interpreted in *Marek*, had its own definition.

In *Roadway Express*, the district court had levied attorney's fees against an attorney under the "costs" term of 28 U.S.C. § 1927. The Court found that section 1927 should

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[7] It is unclear whether "such costs" include only the costs mentioned in subsection (c), *see McDonald*, 966 F.2d at 114, or all costs.

[8] It is also interesting to note that at the time of *Marek*, Rule 54(d) did not differentiate between attorney's fees and other costs. Only in 1993 was the Rule revised to include two subsections, one devoted to "Costs Other than Attorney's Fees," *id.* 54(d)(1) and the other devoted to "Attorney's Fees," *id.* 54(d)(2). The Advisory Notes make clear that the new subsection (d)(2) relates to "attorney's fees, whether or not denominated as 'costs.'" *Id.* Advisory Committee Notes, 1993 Amendments. Thus, the Rule drafters clearly considered attorney's fees to be in some instances part of costs, both before and after the 1993 Amendments to Rule 54.

be read in conjunction with section 1920, which defined costs without reference to attorney's fees. Thus, in a system adhering to the American Rule, there was no authority on which the district court could tax attorney fees against the attorney. Here, Rule 7 provides that the district court may provide security for costs on appeal, and 17 U.S.C. § 505 departs from the American Rule to provide specific statutory authority for including attorney's fees in these costs on appeal. Indeed, it is revealing that the Supreme Court even considered section 1920 in its *Roadway Express* analysis – if attorney's fees could *never* be included in "costs," there would have been no need to look past section 1927, which provided only for "costs."

Inclusion of attorney's fees in a Rule 7 bond does not offend Rule 39 any more than inclusion of any other costs does. Rule 39 provides only that (unless the court orders otherwise) costs on appeal go to the winner, and that certain procedures be followed in the taxing of these costs: the district court's order does not require that costs go to the loser, or that any attorney's fees awarded by this Court be taxed in a manner inconsistent with Rule 39.

Nor is this interpretation inconsistent with 28 U.S.C. § 1920, which grants, permissively, a judge or clerk of court the power to tax certain enumerated costs. Adsani argues that section 1920 enumerates each and every item that may be considered a cost in the federal system. This interpretation would effectively read the words "as part of the costs" out of section 505 (and many other statutes, for that matter). If section 1920 can grant courts the power to tax certain expenses as "costs," then section 505 most certainly can as well.

Nor does the district court's action contravene the apparent purpose of Rule 7. The court has made a determination that this particular appellant poses a payment risk because she has no assets in the United States and has failed to post a supersedeas bond. The purpose of Rule 7 appears to be to protect the rights of appellees brought into

appeals courts by such appellants, yet under Adsani's interpretation of Rule 7, she will be required to cover only a minuscule fraction of her potential liability for bringing this appeal.

Hence, nothing in the language of Rules 7 and 39 prevents, and, more importantly, *Marek* and *Roadway Express* support, the district court's action. Adsani warns that the district court's approach will lead to "anomalous inconsistencies" and the "bizarre" result of much greater bonds being required where the appellant faces the imposition of attorney's fees on appeal. We do not think it either bizarre or anomalous for the amount of the bond to track the amount the appellee stands to have reimbursed. One could as easily call the converse situation "anomalous": in ordinary civil litigation where a bond is justified, appellees would be able to secure bonds for all of the funds to which they would be entitled after judgment in their favor, whereas copyright appellees (among others) would only be entitled to security on a small portion of that which would be theirs after a successful defense.

We find that Adsani's argument that Rule 39's "definition" of costs should be imported into Rule 7 is unavailing because Rule 39 has no definition of the term "costs" but rather defines the circumstances under which costs should be awarded.[9] Adsani's argument that Rule 7 costs cannot include attorney's fees is also unavailing because the Copyright Act in section 505 of Title 17 allows attorney's fees to be levied "as part of the costs."

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[9] We note that the district court's opinion seems to adopt Adsani's reasoning that "costs" as defined by Rule 39, Fed. R. App. P., limits or defines the term "costs" in Rule 7. The district court cites several circuit-level cases for the proposition "that 'costs,' as defined by Rule 39, do not include attorney's fees even when the underlying statute permits such an award." *Id.* We do not discuss these cases here because we find that they are irrelevant to our conclusion that term "costs" under Rule 7 may include the definition of "costs" contained in the relevant substantive statute under which appeal is sought and are not limited by the enumeration of some "costs" found in Rule 39.

B. *The Legislative History of Rule 7*

Adsani argues that the history of Rule 7 itself shows that attorney's fees should not be included in its definition of costs. Rule 7 was originally derived from the former Fed. R. Civ. P. 73(c) "without change in substance," and originally provided for a bond in the fixed amount of $250. *See* Fed. R. App. P. 7, Advisory Comm. Notes, 1967 Adoption, 1979 Amendment. In 1979, Rule 7 was amended: the fixed $250 amount was changed to an amount to be set by the court. The Advisory Committee stated that the $250 figure "has remained unchanged since the adoption of the rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court." *Id.* at 1979 Amendment. Adsani argues that this history reveals that the Rule originally did not countenance attorney's fees – because $250 is obviously too low an amount to include them – and that the subsequent amendment did nothing to include them.

We think that this evidence of the drafters' intent is too weak to be convincing. It is not clear that $250 would have been such a bad estimate for attorney's fees for a simple appeal in 1937. It certainly seems a large sum for appellate-court ministerial fees in 1937: *currently* the costs taxed to losers in the Second Circuit are the $105 notice-of-appeal charge plus printing charges for the appendices and briefs. Therefore, we find that the history of rule 7 is equivocal at best and Adsani's argument does not aid in the construction of the term "costs."

C. *Putting A Price on Appeal*

Finally, Adsani contends that the enormous size of the bond constitutes an impermissible barrier to appeal, citing *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) ("A court is 'without right to...put a price on an appeal.'") (citation omitted), *modified*, *Alabama v. Smith*, 490 U.S. 794

(1989).[10] She also argues that allowing district courts to make a determination of the case's chances on appeal thwarts the review process.

Defendants respond by stating that while the doctrine of *Pearce* is good law, it is not absolute: *any* Rule 7 bond is a "price on an appeal," yet presumably Rule 7 is valid. Thus, they argue, there must be some showing that the bond requirement actually impedes the appellant financially. Defendants then assert simply that Adsani has made no showing of inability to pay the premium on the bond.

Adsani replies that she stated several times to the district court that its imposition of bonds throughout the course of the litigation below caused her financial hardship. For instance, in response to defendants' initial motion at trial for attorney's fees, she claimed that "[i]n order to finance this case, I was forced to sell my home." Adsani has provided no documentation of this alleged sale of her home, nor has she demonstrated that its sale was required to finance this litigation. In fact, Judge Cote found that Adsani had "a complete failure to provide any specific information

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[10] Adsani relies on the language in *Pearce* that a "court is 'without power...to put a price on an appeal.'" 395 U.S. at 724 (quoting *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966)). This language, however, is dicta which does not prevent federal courts from imposing statutorily authorized costs upon appeal. In *Pearce*, the Supreme Court held that there was a constitutional limitation on the imposition of a more severe sentence following appeal and reconviction. In the quote relied upon by Adsani, the Court meant that the "price on an appeal" for a defendant successfully challenging his first conviction should not be suffering the imposition of a more severe criminal sentence upon re-trial. 395 U.S. at 724. The "price of an appeal" language originated in a First Circuit case called *Worcester*, in which a district court in a criminal case imposed a suspended sentence upon a defendant in exchange for his agreement not to appeal his conviction. The First Circuit held that this practice was an improper way "to bargain with the defendant, or to put a price on an appeal." 370 F.2d at 718-19. Therefore, the forbidden "price on an appeal" is metaphorical, meaning merely some condition that is unacceptably burdensome in the eyes of a reviewing court, but does not refer to the absolute inability of the courts to set costs upon appeal where authorized by statute.

regarding [her] finances." App. at 293. Further, in reply to defendants' letter motions for an appeal bond, Adsani did not oppose the bond on any particularized grounds of financial hardship until this appeal.

Adsani also complains that the district court handled the bonding order through letters and not formal motions, apparently on the theory that she would have adduced more evidence of her financial situation in a formal motion. Something more than conclusory assurances, however, must be required of someone with no assets in the country. Moreover, such documentation could easily have been provided in a letter brief. It is, therefore, hard to see how the lack of a formal motion prejudiced Adsani in any way.

Upon appeal, Adsani appears to be arguing that the district court's bond order imposes an unconstitutional burden on her right to appeal. As a preliminary matter, the Due Process Clause of the Fifth Amendment does not establish an absolute right to an appeal. *See United States v. MacCollum*, 426 U.S. 317, 323 (1976). In addition, neither the Equal Protection Clause of the Fourteenth Amendment nor the equal protection aspect of the Fifth Amendment require litigants receive "absolute equality or precisely equal advantages." *Id.* (quoting *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973)). "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). Therefore, principles of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants. *Cf. Pearce*, 395 U.S. at 724-725.

The right to appellate review in federal court is conferred by statute alone. *See* 28 U.S.C. § 1291 ("The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district courts of the United States...except where a direct review may be had in the Supreme Court); *Heike v. United States*, 217 U.S. 423 (1910) (federal right of

appeal is purely statutory); *see also* 15A Wright, Miller, Cooper, FEDERAL PRACTICE AND PROCEDURE § 3801 n.2 (2d ed. 1991).

Jurisdiction of the courts of appeals is not discretionary, but conferred "as a matter of right," where the decision appealed from was rendered pursuant to a statutory grant of federal appellate jurisdiction. The Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," U.S. Const., Art. I, § 8, cl. 8. Thus, the Copyright Act is one of the few statutes authorized by a specific clause in the Constitution. *See Fogerty*, 510 U.S. at 526. Congress has granted to the district courts of the United States original and exclusive jurisdiction over any civil claim "arising under any Act of Congress relating to...copyrights," pursuant to 28 U.S.C. § 1338. And, the courts of appeals of the United States have exclusive jurisdiction to hear an appeal from a final decision of district court when "the jurisdiction of that court was based, in whole or in part, on section 1338 of this title," pursuant to 28 U.S.C. § 1295. *See* 28 U.S.C. §§ 1291, 1295. Therefore, Adsani is correct in maintaining that she has a right to appeal in this case.

Once established, the right to appeal, however, may be limited by statute requiring, for instance, the posting of security for "expenses, including counsel fees, which may be incurred" on appeal without offending principles of Equal Protection or Due Process fairness. *Cohen v. Beneficial Loan* Corp, 337 U.S. 541, 551-52 (1949); *see also O'Day v. George Arakelian Farms,* Inc., 536 F.2d 856, 860 (9th Cir. 1976) (holding that Congress may properly "condition the right to appeal upon posting security sufficient to protect appellee from loss of damages already awarded, interest, and (as established in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 552 (1949)) costs on appeal, including a reasonable attorney's fee."). Admittedly, the Supreme Court found that "to require security for payment of any kind of costs, or the necessity for bearing any kind of expenses of litigation, has a

deterring effect." *Cohen*, 337 U.S. at 552. Nonetheless, government has the power "to close its courts ... if the condition of reasonable security is not met." *Id.*

Government's power to "close its courts" by imposing fees upon appeal, however, is not unlimited, and may be invalid either facially, *see Lindsey*, 405 U.S. at 77-79; *O'Day*, 536 F.2d at 861, or as applied. *See Clark v. Universal Builders, Inc.*, 501 F.2d 324, 341-42 (7th Cir.), *cert. denied*, 779 F.2d at 718-19. In *Lindsey*, the Supreme Court held that the Equal Protection clause was violated by a state statute requiring a lessee who wished to appeal to file a bond in the amount of twice the rental value of the premises involved. 405 U.S. at 77. The Court based its ruling on the fact that "the double-bond requirement heavily burdens the statutory right . . . to appeal." *Id.* While the Court found it reasonable to require adequate security to preserve an award already made and protect appellees from loss during appeal, the double-bond failed to effectuate these purposes. *Id.* at 77-78. The Court noted that the double-bond requirement did not serve to screen out frivolous appeals because the double-bond "allows meritless appeals by others who can afford the bond." *Id.* at 78. The requirements of security for appeal to protect appellees are valid if "reasonably tailored to achieve theses ends and uniformly and nondiscriminatorily applied." *Id.* at 79. In addition, such security should never be automatically assessed because this will undoubtedly discriminate against those litigants who cannot afford to post a bond. *Id.*

The *Lindsey* test has been used to invalidate an act of Congress. In *O'Day*, the Secretary of Agriculture imposed a double bond to effectuate appeal to the district court, pursuant to 7 U.S.C. § 499g(c). Invoking *Lindsey*, the Ninth Circuit held that the *double* bond requirement has not rationally related to securing the risk involved and constituted an unconstitutional denial of equal protection. Nonetheless, due to a severability clause in 7 U.S.C. § 499q, the statutory provision requiring a bond was sustained to the extent that it required a bond sufficient to secure payment of

the damages award, interest, and costs on appeal including attorney's fees. *Id.* at 861.

Here, the threshold question is whether 17 U.S.C. § 505 is facially unconstitutional, based on *Lindsey* and *O'Day*. Section 505 provides: "[i]n any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party ... the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." Therefore, section 505 appears to be valid on its face because the statute neither permits the imposition of a double bond nor is the bond automatically imposed.

Furthermore, in *Fogerty*, the Supreme Court has extensively analyzed 17 U.S.C. § 505 and its place within the statutory scheme of the Copyright Act. With regard to the award of attorney's fees under 17 U.S.C. § 505, the Court held that "prevailing plaintiffs and prevailing defendants are to be treated alike." *See Fogerty*, 510 U.S. at 534. In contrast to Civil Rights Act cases, in which prevailing plaintiffs are favored, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 527. The High Court reached this decision because "the policies served by the Copyright Act are more complex, more measured, than simply maximizing the number of meritorious suits for copyright infringement," and "the limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest." *Id.* at 526 (quotation marks and citation omitted). Congress has decided to constrain the rights of copyright litigants upon appeal by exposing them to the potential imposition of a Rule 7 bond for the "costs of appeal" where attorney's fees are awarded "as part of the costs." *See* 17 U.S.C. § 505; Fed. R. App. P. 7. Given (1) the Supreme Court's extensive discussion of the purpose of section 505 in *Fogerty* and (2) the additional observation that the type of bond contemplated by section 505 has been explicitly endorsed by the Ninth Circuit in *O'Day* and the Supreme

Court in *Cohen*, we hold that the statute's requirements of security for appeal to protect appellees are "reasonably tailored to achieve these ends." *Lindsey*, 405 U.S. 78.

A cost requirement, however, valid on its face may be unconstitutional as applied to a particular case, *see Boddie v. Connecticut*, 401 U.S. 371, 379-81 (1971); *Clark*, 501 F.2d at 341; *American Presidential Lines*, 779 F.2d at 718-19. In *Boddie*, the Supreme Court held that a state statute which required fees to bring a civil action for divorce, regardless of ability to pay, violated the Due Process Clause of the Fourteenth Amendment. 401 U.S. at 382. In *Boddie*, the deciding factor was appellants' undisputed inability to pay the costs as well as undisputed good faith in seeking divorce. Further, in *Clark*, a district court ordered that each party would bear its own trial costs, pursuant to Rule 54(d), unless there was an appeal, in which case "there would be no costs assessed against those who do not appeal." *Clark*, 501 F.2d at 341. The Seventh Circuit overturned this order, stating "[a]lthough the district court has discretionary power to assess costs, the action it took was improper and clearly an abuse of discretion . . . [A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated." *Id.* Moreover, in *American Presidential Lines*, the D.C. Circuit held that the district court exceeded its authority in requiring a $10,000 cost bond under Rule 7 alone without sufficient justification. 779 F.2 at 718-19.

If we compare the instant case to *Boddie*, we find that without any showing of her financial hardship, the bond imposed on Adsani is not an impermissible barrier to appeal and Adsani's arguments to the contrary should be rejected. Unlike the district court in *Clark*, the imposition of trial costs were not conditioned upon whether or not appeal was taken. First of all, Adsani was ordered to pay a judgment of trial attorney's fees of $107,993.39, regardless of whether she appealed or not. Secondly, the district court imposed attorneys fees under Rule 7 to provide a security unrelated to the award of fees at trial, but rather looked to the merits of the appeal itself and the material circumstances of the

litigants. Thus, unlike *American Presidential Lines*, the district court did not exceed its statutory authority to impose costs. The district court directed Adsani to pay attorney's fees because her case was found to be "objectively unreasonable." The Supreme Court has expressly endorsed "objective unreasonableness" as a sound basis for awarding attorney's fees to a prevailing defendant in a Copyright Act case, pursuant to 17 U.S.C. § 505. *Fogerty*, 510 U.S. at 534 n.19. Adsani's trial bond of $50,000 only covered part of these attorney's fees: $57,993.39 remained unsecured. Under these circumstances, where Adsani has no assets in the United States and failed to adduce credible evidence of an inability to pay, the district court did not abuse its discretion nor violate Adsani's due process rights in imposing an appeal bond of $35,000.

As for Adsani's argument that the district court is prejudging the case's chances on appeal: not only is such prejudging part and parcel of Rule 7, but this argument falls with the financial hardship argument. The only way that an appellant would have to pay any "costs" would be if he or she lost on appeal: therefore, a district court's imposition of any sort of cost bond (whether or not including attorney's fees) can always be described as an implicit finding that the appellant's appeal lacks merit, or at least that the appellant poses a payment risk. A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal. *See Sckolnick*, 820 F.2d at 15. The power to impose an appeal bond under Rule 7 has been specifically given to the discretion of the district court. *See* Rule 7, Fed. R. App. P. ("The district court may require appellant to file a bond or provide other security ...") Moreover, where as here, a federal statute includes attorney's fees "as part of the costs" which may be taxed upon appeal, the district court may factor these fees into its imposition of the bond for costs. In any event, without any showing of financial hardship, there is no deterrent to appeal in the first place. If the court has not

deterred the appeal, the court has not frustrated the review process.

Consequently, we affirm the order of the district court requiring Adsani to post a bond of $35,000 pending the outcome of her appeal pursuant to Rule 7 of the Federal Rules of Appellate Procedure.

APPENDIX C

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of February, one thousand nine hundred and ninety-eight.

PRESENT: HON. James L. Oakes
HON. Fred I. Parker
Circuit Judges
HON. Eugene H. Nickerson
District Judge*

Docket No.: 96-9593

FRIEDERIKE MONIKA ADSANI,

Plaintiff-Appellant,

-against-

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC.; AVON BOOKS; THE HEARST CORPORATION; BANTAM DOUBLE DAY DELL PUBLISHING GROUP, INC.,

Defendants-Appellees.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the order of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

* The Honorable Eugene H. Nickerson, of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX D

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-third day of April, one thousand nine hundred and ninety-eight.

Docket No.: 96-9593

ADSANI,

Plaintiff-Appellant,

-against-

MILLER;

Defendants-Appellees.

Filed
April 23, 1998

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Adsani.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

APPENDIX E

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the first day of July, one thousand nine hundred and ninety-eight.

PRESENT: The HON. Thomas J. Meskill,
The HON. José A. Cabranes,
Circuit Judges
The HON. Eugene H. Nickerson*
District Judge

Docket No.: 96-9415

FRIEDERIKE MONIKA ADSANI,

Plaintiff-Appellant,

-against-

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC.; AVON BOOKS; THE HEARST CORPORATION; BANTAM DOUBLE DAY DELL PUBLISHING GROUP, INC.,

Defendants-Appellees.

This Court having denied on June 2, 1998, appellant's motion to hold the instant appeal (No. 96-9415) in abeyance pending disposition of his petition for a *writ of certiorari* from this Court's decision in appeal No. 96-9593 (affirming security bond order), IT IS HEREBY ORDERED that appellant

comply with the order affirmed in No. 96-9593 by posting a $35,000 security bond for appellate costs within thirty (30) days of the entry of this order. Failure to do so will result in the dismissal with prejudice of the instant appeal (No. 96-9415).

For the Court
GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador
Administrative Attorney

* The Honorable Eugene H. Nickerson, of the United States District Court for the Eastern District of New York, sitting by designation.

Supreme Court, U.S.
FILED
AUG 19 1998
OFFICE OF THE CLERK

No. 98-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRIEDERIKE MONIKA ADSANI,

Petitioner,

vs.

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JEAN P. SASSON, WILLIAM MORROW AND COMPANY, INC., AVON BOOKS, THE HEARST CORPORATION, AND BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.

RICHARD DANNAY
Counsel of Record
COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Respondents
Jean P. Sasson, William Morrow and Company, Inc., Avon Books, The Hearst Corporation, and Bantam Doubleday Dell Publishing Group, Inc.
1133 Avenue of the Americas
New York, New York 10036
(212) 790-9200

QUESTION PRESENTED

Whether the Court should disturb the Second Circuit's decision that a Fed. R. App. P. 7 bond for "costs" may include attorney's fees when the underlying substantive statute (here, § 505 of the Copyright Act) allows fees "as part of the costs" on appeal, where

- there is no conflict among the circuits on that issue;
- the decision is consistent with this Court's holding in *Marek v. Chesny*; and
- petitioner, a foreign resident with no assets in the United States, submitted no credible evidence of financial hardship or inability to pay, and refused to pay the unsecured portion of the district court judgment awarding respondents substantial attorney's fees based on the dismissal of petitioner's "objectively unreasonable" copyright claim.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Bantam Doubleday Dell Publishing Group, Inc. ("BDD") is Bertelsmann Publishing Group, Inc., whose parent is Bertelsmann, Inc. Bertelsmann AG is the parent of Bertelsmann, Inc. BDD has no nonwholly-owned subsidiaries.

The Hearst Corporation ("Hearst") is a privately held company. Hearst owns a majority interest in Hearst-Argyle Television Inc., a publicly held subsidiary. William Morrow and Company, Inc., and Avon Books are units of Hearst, their parent company, and neither has any nonwholly-owned subsidiaries.

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STATEMENT OF THE CASE

By her petition, Adsani — a foreign resident with no assets in the United States — seeks to remove the Rule 7 bond requirement to allow her to take her merits appeal risk-free, that is, with no risk that any potential award of appellate attorney's fees, which are allowable "as part of the costs" under Section 505 of the Copyright Act, 17 U.S.C. § 505, could be collected.

The petition should be denied for four reasons. First, there is no split in the circuits on the issue of whether a Rule 7 bond may include attorney's fees in the circumstances here. The decision below appears to be the first court of appeals case to hold that anticipated attorney's fees can be included in an appeal bond for "costs" if the underlying substantive statute allows attorney's fees "as part of the costs" that are recoverable by the prevailing party on appeal. The two circuit court cases petitioner relies on do not involve such underlying statutes.

Second, the court of appeals decision is consistent with and relied on this Court's decision in *Marek v. Chesny* (similarly interpreting Fed. R. Civ. P. 68). Third, the court of appeals decision does not create an impermissible barrier to appeal, nor does it permit district courts to insulate their judgments from appellate review. The Rule 7 bond was not an abuse of discretion or a violation of Adsani's due process or equal protection rights, where: (1) the lower court found her copyright claim to be "objectively unreasonable;" (2) this Court has

expressly approved "objective unreasonableness" as a sound basis for awarding attorney's fees to a prevailing defendant under the Copyright Act; (3) Adsani, a foreign resident with no assets in the United States, had submitted no credible evidence of her inability to pay or her financial hardship; (4) she had neither paid nor bonded the nearly $58,000 balance of her judgment below; and (5) any Rule 7 bond would be applied as security only if she lost her merits appeal and if additional attorney's fees were awarded on appeal under the Copyright Act.

Fourth, Adsani's failure to post the Rule 7 bond and the consequent dismissal of her merits appeal moots the issue presented by her petition. In the time available to her before petitioning for certiorari, she did not seek a stay of the bond requirement from this Court. Following her pattern in the district court and the court of appeals, she made no effort to demonstrate to this Court that she lacked the financial resources to post the appeal bond. She has thus unjustifiably permitted the dismissal with prejudice of her merits appeal solely to dramatize her position on the bond issue.

A. The District Court

In her complaint, Adsani claimed that the copyrights in three manuscript versions of her unpublished autobiography titled *Cinderella in Arabia* or *Cinderella in Kuwait* ("Cinderella") were infringed by two books written by Jean Sasson: *Princess: A True Story of Life Behind the Veil in Saudi Arabia* ("Princess") (published in hardcover in 1992 by defendant William Morrow and in paperback in 1993 by defendant Avon Books, both units of defendant Hearst), and *Princess Sultana's Daughters* ("Daughters") (published in hardcover in 1994 and in paperback in 1995 by divisions of defendant Bantam Doubleday Dell). Adsani's "Cinderella" is an account of her life as a European woman who marries a Kuwaiti medical student while both are

in England, and the ordeal of her life as a Western woman living with her abusive husband and his family in Kuwait. "Princess" and "Daughters" are accounts of the life of a Saudi Arabian princess and her family. Adsani asserted a claim of copyright infringement against all defendants. She also asserted three state law claims: breach of fiduciary duty against Miller, her former literary agent (and his company, PMA Literary and Film Management, Inc.); misappropriation of ideas against Sasson and Miller; and unjust enrichment against all defendants (the dismissal of which was not appealed).

At the first pretrial conference (1996 WL 539780, *11-12 (S.D.N.Y.)), defendants asserted that Adsani's claims were utterly without merit and asked that Adsani, a foreign resident, be required to post a bond pursuant to Local Rule 39 (now 54.2) in an amount sufficient to cover the attorney's fees to which defendants might be entitled under *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The district court ordered Adsani to post a bond of $10,000, and she complied with no objection as to amount.

Adsani pressed for unlimited discovery. The defendants contended that the copyright and related claims were without merit due to the absence of substantial similarity between the works, and that a motion for summary judgment on this limited issue could dispose of the entire case (except for the breach of fiduciary duty claim). The district court stayed all further discovery, but undertook to read promptly one of the three versions of Adsani's manuscript as well as "Princess" in order to determine whether the stay should be lifted and discovery should proceed — as Adsani requested — during the briefing of the motion.

After reading "Princess" and a version of Adsani's manuscript that Adsani selected, the district court advised the

parties that it expected to grant defendants' anticipated summary judgment motion dismissing the copyright infringement, misappropriation, and unjust enrichment claims. Miller joined in their motion and later served a separate motion for summary judgment on the breach of fiduciary duty claim.

While the summary judgment motions were pending, the court, on defendants' motion, ordered Adsani to file an additional bond of $40,000 or a substitute bond of $50,000. Adsani complied. Although she opposed the increase, she did not do so on the ground of financial hardship.

The district court granted defendants' motion for summary judgment dismissing the copyright claim on the ground that, as a matter of law, there was no actionable similarity between Adsani's and defendants' works. 1996 WL 194326 (S.D.N.Y. 1996). It also dismissed the two related state-law claims as preempted by the Copyright Law. *Id.* at *15-17.

The district court held:

> In conclusion, the only similarities between these two books stem from the fact that each has a female protagonist living in a Middle Eastern country. Beyond that, they bear almost no relationship to each other.

The district court found that the works

> are not similar in mood, details, sequence, or characterization. . . . [T]he conclusion is inescapable that there is no substantial similarity between "Princess" or "Daughters" on the one hand and "Cinderella" on the other.

1996 WL 194326, *15.

Having compared the works in detail, the district court briefly summarized their striking differences:

> "Princess" and "Daughters" tell the story of a very privileged, wealthy woman [the pseudonymous Princess Sultana] from the highest social stratum married to a hard working, decent, enlightened husband. She is principally concerned about the lot of women in Saudi Arabia, a country she describes as having a deeply religious culture. Drawing on her life experiences, she relates anecdotes about the shocking treatment of other women in her country.
>
> In contrast, "Cinderella" is the biography of a European woman who is financially dependent on her abusive, unfaithful, alcoholic husband. She relates her personal struggle to survive in an alien culture for which she has little respect. Her struggle centers on the grotesque treatment she receives from her husband and her in-laws, bringing to mind the image of the fairy tale Cinderella's treatment at the hands of her step-mother and step-sisters. To preserve her mental health, she engages in various entrepreneurial projects, including opening a restaurant and a boutique. The country [Kuwait] she describes is preoccupied with consumerism and alcohol, rather than religion. Rather than being concerned with issues of feminism and human rights, she is concerned with fashion, table manners, social status, acquisition of wealth, and the way Kuwaitis treat foreigners. It is, in the final analysis, a deeply personal story of one woman's escape from a humiliating and degrading marriage, an escape made possible by her tremendous energy and indomitable spirit. The feminist issues that are at the

> core of "Princess" and "Daughters", such as female circumcision, are mentioned in passing simply as further examples of the backwardness of Arab culture.

Id.

Subsequently, the district court dismissed the entire complaint with prejudice (including the breach of fiduciary duty claim) and granted defendants' request for attorney's fees and other costs under Section 505 of the Copyright Act (17 U.S.C. § 505), finding that "plaintiff's copyright infringement claim was objectively unreasonable" and, further, that "an award of attorney's fees is appropriate in this case 'to advance considerations of compensation and deterrence' " (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. at 534 n.19). 1996 WL 539780, *16 (S.D.N.Y. 1996). The district court found: "that plaintiff's claim of substantial similarity was objectively unreasonable does not even present a close question." *Id.* at *14.

The district court awarded defendants their fees and other costs in the amount of $107,993.39 ($96,545.14 to defendants Morrow, Avon, Hearst, Bantam and Sasson, and $11,448.25 to the Miller defendants). Rejecting all of Adsani's arguments to mitigate the award, the district court stated:

> [G]iven the complete failure to provide any specific information regarding plaintiff's finances, nothing in plaintiff's declaration convinces me that an award in the amount requested by the defendants would work an undue hardship on the plaintiff.

1996 WL 539780, *17.

Adsani noticed an appeal from the judgment. Adsani's bonding company paid the $50,000 trial bond in partial satisfaction of the nearly $108,000 judgment, but she neither paid the remainder nor attempted to stay enforcement of the judgment by posting a supersedeas bond or seeking a stay without bond. Defendants requested the district court to require Adsani to file a bond, under Fed. R. App. P. 7, to ensure payment of "costs on appeal," in an amount sufficient to cover a potential award of additional attorney's fees to defendants under the Copyright Act if the dismissal of the copyright claim were affirmed on appeal. The district court ordered Adsani to file a $35,000 bond "to cover the costs of appeal and a possible award of attorney's fees associated with that appeal." Pet. App. 1a, 5a. The district court found

> such a bond necessary given plaintiff's failure to post a supersedeas bond and her lack of assets in the United States. Failure to require a bond may render any award of attorney's fees by the Court of Appeals, should it determine that such an award is appropriate, a nullity.

Id. at 4a-5a.

The district court stayed its order for two weeks to give Adsani time to comply or appeal. *Id.* at 5a. At the end of that two-week period, Adsani noticed an appeal and applied in the district court to extend the stay, which the district court denied.

B. The Court of Appeals

Adsani moved in the court of appeals to vacate the Rule 7 bond order or, in the alternative, to consolidate the appeal from the bond order with her appeal from the judgment on the merits, and to stay the bond order until determination of the consolidated

appeals. Defendants cross-moved to stay the appeal on the merits pending resolution of the appeal from the Rule 7 bond order. Following argument, the court of appeals unanimously stayed the merits appeal pending resolution of the appeal from the bonding order. January 17, 1997 Order.

On February 23, 1998, the court of appeals unanimously affirmed the district court's bond order. Pet. App. 6a-29a. The court of appeals held that a Rule 7 bond for "costs" may include an amount to cover potential attorney's fees on appeal if the underlying substantive statute, here Section 505 of the Copyright Act, allows attorney's fees "as part of the costs" that the prevailing party may recover on appeal. Pet. App. 11a-20a.

Rule 7 provides that a district court

> may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case.

Fed. R. App. P. 7. The court of appeals found that, while Rule 7 does not define "costs," neither is its definition supplied by Fed. R. App. P. 39, which refers to certain costs without explicit mention of attorney's fees. Rule 39 concerns the procedures and circumstances for taxing costs but does not define or limit appeal costs for Rule 7 purposes. The Copyright Act provides for the award of attorney's fees, including fees associated with appeals, to a prevailing party "as part of the costs." 17 U.S.C. § 505; *see, e.g., Twin Peaks Prods. Inc. v. Publications Int'l., Ltd.*, 996 F.2d 1366, 1383 (2d Cir. 1993) (Copyright Act authorizes award of fees for services on appeal as well as at trial level). Thus, the court of appeals held, Rule 7 "costs" can include attorney's fees because Section 505 of the Copyright Act allows attorney's fees to be awarded "as part of the costs."

The court of appeals held that *Marek v. Chesny*, 473 U.S. 1 (1985), was "very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7." Pet. App. 15a. In *Marek*, this Court interpreted "costs" in Fed. R. Civ. P. 68, which was not otherwise defined, to include all costs properly awardable under the relevant substantive statute. Thus, absent congressional expressions to the contrary, attorney's fees should be included as costs for purposes of Rule 68 where the underlying statute (there 42 U.S.C. § 1988) defines "costs" to include attorney's fees.

The court of appeals distinguished *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), on the same ground that *Marek* did, namely, that the statute in *Roadway* had its own pre-existing definition of costs that excluded fees. Pet. App. 18a-19a. The court of appeals found that Rule 7 does not have a pre-existing definition of costs any more than did Fed. R. Civ. P. 68, the rule interpreted in *Marek*. Pet. App. 18a. Inclusion of fees in a Rule 7 bond, the court held, did not contravene Rule 39 and was not inconsistent with 28 U.S.C. § 1920. To hold that those provisions provided the exclusive enumeration of costs would effectively read the words "as part of the costs" out of Section 505 of the Copyright Act (and many other statutes as well). Pet. App. 19a.

The court of appeals also held that its interpretation of Rule 7 was consistent with its purpose, namely, to protect prevailing appellees against the risk of non-payment of their appeal costs. Pet. App. 19a-20a. Excluding fees from Rule 7 costs would mean that the Rule would cover only a minuscule fraction of Adsani's potential liability for bringing her appeal. *Id.* at 20a. It would be anomalous, the court found, that copyright appellees (among others), unlike ordinary civil litigants, would be entitled to security on only a small portion of that which would be

theirs after a successful defense. *Id.* Nothing in the legislative history of Rule 7 shows that fees should be excluded. *Id.* at 21a.

The court of appeals also rejected Adsani's contention that the size or nature of the bond constituted an impermissible barrier to appeal or permitted district courts to thwart appeals from their own judgments. Pet. App. 21a-29a.

Any limitation on the right to appeal resulting from the requirement to post security did not violate due process or equal protection guarantees, because the requirement would not be applied to an appeal by a party financially unable to post the security. Pet. App. 24a-28a. Adsani offered no credible evidence in the district court of financial hardship or inability to pay, either in response to the imposition of the trial bond or in response to the attorney's fees motion, or even in response to the request for an appeal bond. The courts below found her unsupported, conclusory claims to be inadequate, especially for someone with no assets in the United States and who had incurred a $108,000 judgment that was partially satisfied only by the $50,000 trial bond she was required to post. *Id.* at 22a-23a, 27a-28a. Furthermore, her obligation to pay the judgment existed regardless of whether she appealed and was thus not a condition on her right to appeal. The Rule 7 bond was unrelated to the award of fees in the district court, but rather was based on potential additional liability she might incur on appeal. *Id.* at 27a-28a.

Moreover, the court of appeals noted that Adsani was required to pay attorney's fees in the district court because her case was found to be "objectively unreasonable," a ground endorsed by this Court as a sound basis for awarding fees to a prevailing defendant in a case under § 505 of the Copyright Act, *Fogerty*, 510 U.S. at 534 n.19. Pet. App. 28a. *Fogerty*

itself recognizes the important role of an award of § 505 attorney's fees in the statutory scheme of the Copyright Act, for prevailing defendants as well as prevailing plaintiffs. *Id.* at 26a.

The court of appeals observed that Rule 7 specifically entrusts to the district court's discretion the power to impose a Rule 7 appeal bond, thus necessarily implicating district court consideration of the merits of the appeal and the payment risk an appellant poses. Pet. App. 28a. Where Congress has enacted a statute including attorney's fees "as part of the costs" that may be taxed on appeal, the district court may consider those potential fees in determining the size of the bond. *Id.* Where, as in Adsani's case, there is no showing of financial hardship, there is no deterrent to appeal and no frustration of the review process. *Id.* at 28a-29a. Nor will the bond impose any payment obligation, unless Adsani loses her appeal and the court of appeals awards appellate fees. *Id.* at 28a.

On April 23, 1998, the court of appeals denied Adsani's petition for rehearing with suggestion for rehearing in banc. Pet. App. 32a. On June 2, 1998, it also denied her motion to hold her merits appeal in abeyance pending disposition of her petition for a writ of certiorari from the court's decision affirming the Rule 7 bond order. *Id.* at 33a. On July 1, 1998, the court of appeals ordered Adsani to comply with the bond order by posting a $35,000 security bond for appellate costs within 30 days of entry of its July 1, 1998 order, directing that Adsani's failure to do so would result in the dismissal with prejudice of her merits appeal. *Id.* at 33a-34a.

Adsani declined to post the appeal bond and permitted her merits appeal to be dismissed, claiming in her petition that she was "unable" to post the bond (Pet. 5) — contrary to the findings of the district court and court of appeals that she had submitted

no credible evidence of inability to pay or financial hardship. *See, e.g.*, Pet. App. 22a-23a, 27a, 28a. Adsani's July 21, 1998 petition for a writ of certiorari to review the Rule 7 bond order was not preceded or accompanied by any attempt to seek from this Court a stay of that order (or the order directing compliance or dismissal). Nor did Adsani seek to proceed in this Court *in forma pauperis* under Rule 39, which would have required the sort of financial disclosure she consistently evaded in the courts below.

On August 6, 1998, Adsani renewed her motion in the court of appeals to hold her merits appeal in abeyance and requested the court to vacate its July 1 order dismissing her merits appeal if she failed to post the bond within the 30-day period. Her motion was made about one week after the 30-day period had expired and about two weeks after her certiorari petition was filed. On August 12, 1998, the court of appeals denied Adsani's motion. Adsani has informed this Court that

> by the date this petition is considered, the appeal from the judgment will have been dismissed with prejudice for her failure to satisfy the lower court's bonding requirement.

Pet. 5-6. This brief (including in particular Point IV below) assumes the accuracy of her statement to this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT IN THE CIRCUITS ABOUT WHETHER A RULE 7 BOND FOR "COSTS" MAY INCLUDE ATTORNEY'S FEES WHEN THE UNDERLYING SUBSTANTIVE STATUTE ALLOWS FEES "AS PART OF THE COSTS" ON APPEAL.

This case appears to be the first court of appeals case to hold that potential attorney's fees can be included in a Rule 7 appeal bond for "costs" if Congress provided in the underlying substantive statute that the prevailing party may recover attorney's fees on appeal "as part of the costs."

Adsani relies on two cases that she contends create a split in the circuits on the issue: *In re American President Lines*, 779 F.2d 714 (D.C. Cir. 1985), and *Hirschensohn v. Lawyers Title Insur. Corp.*, 1997 WL 307777 (3rd Cir. 1997). While these cases discuss whether Rule 39 supplies the definition of "costs" for Rule 7, neither involves the effect of a separate underlying statute authorizing attorney's fees "as part of the costs" on appeal.

In *American President Lines*, the D.C. Circuit stated that the costs referred to in Rule 7 are those that may be taxed against a losing litigant under Appellate Rule 39, and do not include attorney's fees that may be awarded on appeal. 779 F.2d at 716. However, as the Second Circuit pointed out, the court cites no case law that directly supports this proposition. Moreover, unlike *Adsani*, there was no statute authorizing an award of attorney's fees "as part of the costs." Thus the holding in *American President Lines* merely follows the usual practice in the United States that a prevailing party is not entitled to recover attorney's fees as "costs" in the absence of a statute

allowing such an award. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Furthermore, the D.C. Circuit's analysis and conclusion in *American President Lines* are undermined by its failure to discuss *Marek v. Chesny*, 473 U.S. 1 (1985), which had been decided about six months earlier, and *Marek's* implications for interpreting "costs." Had the court considered *Marek*, it would have had to explain why *Marek*'s "plain meaning" rule applies to Fed. R. Civ. P. 68 but not to Fed. R. App. P. 7, and why *Marek*'s conclusion that "all costs properly awardable in an action are to be considered within the scope of Rule 68 'costs' " does not apply to Rule 7. *Marek*, 473 U.S. at 9. The *American President Lines* case merely involved a potential award of fees under Fed. R. App. P. 38 (attorney's fees for frivolous appeals), a matter peculiarly within the province of a court of appeals, and not a substantive statute (like the Copyright Act) where fees may be awarded as part of the costs.

Finally, as the court of appeals pointed out below, *American President Lines* may have been modified or implicitly overruled by *Montgomery & Assocs. v. CFTC*, 816 F.2d 783, 784 (D.C. Cir. 1987), and thus may provide "an ambiguous precedent of little authority." Pet. App. 16a n.6.

In *Hirschensohn*, an unreported Third Circuit decision, the court, relying on *American President Lines*, found that Rule 7 costs are those that may be taxed under Rule 39. Finding that Rule 39 costs do not include attorney's fees, the court concluded that Rule 7 does not authorize a bond to cover estimated costs of attorney's fees. First, the court noted that attorney's fees were assessed under a Virgin Islands statute, not a federal statute. Second, the Third Circuit held that the Virgin Islands law "does not authorize assessment of counsel fees on appeal to this Court." 1997 WL 307777, *3. Given

this basis for its decision, it is not clear why the Third Circuit even needed to discuss the interplay between Rules 7 and 39. In any event, as the court of appeals stated below,

> *Hirschensohn* does not address the case where, as here, an independent federal statute explicitly authorizes attorney's fees 'as part of the costs' both at trial and upon appeal which permits a district court to order a Rule 7 appeal bond including such costs.

Pet. App. 17a.

Adsani incorrectly states, Pet. 5, that the court "acknowledged" a split in the circuits. On the contrary, the court of appeals observed that neither *American President Lines* nor *Hirschensohn* directly supports Adsani's case, nor does either case create a conflict among the circuits. Pet. App. 15a-17a. The court of appeals also noted that the only other circuit-level case touching upon the relationship between Rules 7 and 39 as to "costs," *Sckolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987) (per curiam), interprets Rule 7 to permit a bond that sought security for a possible sanction in the form of attorney's fees on appeal. "By implication, 'costs' under Rule 7 would not exclude attorney's fees as a blanket rule for that court." Pet. App. 17a.

Adsani's assertion that "[t]he leading treatises also conclude that costs under Rule 7 are limited to those taxable under Rule 39," Pet. 9 & n.6, is misleading. Apart from relying primarily on *American President Lines*, they — like that case — do not discuss (or cite) *Marek* or the effect of an underlying substantive statute that authorizes attorney's fees "as part of the costs" on appeal.

Nor is it relevant, as Adsani asserts (Pet. at 10 & n.8, and 11), that several circuit-level cases have ruled that Rule 39

costs do not include attorney's fees even when the underlying statute permits such an award. As the court of appeals found,

> they are irrelevant to our conclusion that [the] term "costs" under Rule 7 may include the definition of "costs" contained in the relevant substantive statute under which appeal is sought and are not limited by the enumeration of some "costs" found in Rule 39.

Pet. App. 20a n.9. These cases do not involve Rule 7 or address the issue of whether attorney's fees may be considered "costs" for Rule 7 purposes. Rather, most of these Rule 39 cases involve such issues as whether a motion for appellate attorney's fees must be made within the time limits of Rule 39(d) or whether a Rule 39 order that each party must bear its own costs on appeal precludes an award of attorney's fees.

There is no "split" or "disarray" in the circuits (Pet. 9) about whether a Rule 7 bond for "costs" may include attorney's fees when the underlying statute permits fees "as part of the costs" on appeal.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *MAREK v. CHESNY* THAT "COSTS" MAY INCLUDE ATTORNEY'S FEES.

The court of appeals correctly applied to this case this Court's opinion in *Marek v. Chesny*, 473 U.S. 1 (1985), concerning the relationship between "costs" and attorney's fees. Pet. App. 14a-15a, 18a. In *Marek*, this Court considered whether the cost-shifting provision of Fed. R. Civ. P. 68 permits a plaintiff in a civil rights suit to recover attorney's fees when he is the prevailing party but has obtained a judgment for less than the amount of defendant's Rule 68 offer of judgment.

This Court framed the issue as "whether the term 'costs' in Rule 68 includes attorney's fees awardable under 42 U.S.C. § 1988." *Marek*, 473 U.S. at 7. The Court noted that a number of statutes, including 42 U.S.C. § 1988 and the Copyright Act, permit awards of attorney's fees "as part of the costs" and that the authors of the Federal Rules of Civil Procedure were well aware of these exceptions to the "American Rule" against including attorney's fees in costs. *Id.* at 8. Where the drafters did not define "costs" and there was no "explanation" of "its intended meaning in the history of the Rule," the Court gave the Rule its "plain meaning." *Id.* at 9.

> In this setting, given the importance of "costs" to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Id.

This Court observed that

> [t]his "plain meaning" interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.

Id. at 9. Similarly, a "plain meaning" interpretation of the interplay between Rule 7 and 17 U.S.C. § 505, construing "costs" in both provisions as including attorney's fees, is the

only construction that gives meaning to each word in both Rule 7 and Section 505. *See also, Hutto v. Finney*, 437 U.S. 678, 693-700 (1978) (treating civil rights attorney's fees as "costs").

Adsani relies on *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), for the proposition that the term "costs" does not incorporate an attorney's fees provision in the underlying statute when the term comes with its own statutory definition. *See Marek*, 473 U.S. at 9 n.2. Adsani argues that Rule 7 has, in Rule 39, a preexisting definition of costs; that Rule 39 excludes attorney's fees; and that Rule 7 must therefore exclude fees as well — even when the underlying statute in the case permits attorney's fees to be awarded "as part of the costs."

But, as the court of appeals held, "Rule 7 does not have a pre-existing definition of costs any more than Fed. R. Civ. P. 68, the rule interpreted in *Marek*, had its own definition." Pet. App. 18a. Neither the text of Rule 7 nor the Advisory Committee notes refer to Rule 39. Nothing in the text of Rule 39 or in the Advisory Committee notes states that Rule 39 contains the exclusive source of costs for Rule 7 purposes.[1] As this Court stated in interpreting the copyright fee statute in *Fogerty*, 510 U.S. at 524 n.11, "Congress clearly knows how to use mandatory language when it so desires." Similarly, if the drafters of Rule 7 had intended that Rule 7 "costs" be limited only to those costs identified in Rule 39, they certainly would have known how to use language mandating such a narrow definition of "costs."

Nothing in Adsani's labored and misleading discussion of the history of Rules 7 and 39 (Pet. 12-14) undercuts the court

1. Moreover, nothing in Rule 39 provides that it is the only source of appeal costs. In fact, Rule 39(a) begins: "Except as otherwise provided by law. . . ." *See* Pet. App. 17a-20a.

of appeals' discussion or conclusion that Rule 39 does not define or limit costs for Rule 7, and that Rule 7 costs can include attorney's fees because the Copyright Act (17 U.S.C. § 505) allows attorney's fees to be taxed "as part of the costs." Pet. App. 17a-21a. Where Congress has classified attorney's fees "as part of the costs," it must be presumed that it understood the implications of that classification for other statutes and rules relating to "costs." Moreover, the court of appeals' interpretation of Rule 7 is in keeping with Rule 7's purpose of protecting the rights of appellees against appellants such as Adsani who pose a payment risk. Pet. App. 19a-20a.

Attorney's fee awards to prevailing defendants in copyright infringement suits serve important public policies. In *Fogerty*, this Court stated:

> Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. In the case before us, the successful defense of "The Old Man Down the Road" increased public exposure to a musical work that could, as a result, lead to further creative pieces. Thus a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.

510 U.S. at 527.

The district court recognized these principles when concluding that defendants were entitled to attorney's fees for successfully defending against Adsani's objectively unreasonable infringement claims. 1996 WL 539780, *12-17 (S.D.N.Y.). The policies favoring attorney's fees awards to successful defendants also favor requiring an appellant such as Adsani to post a bond to secure appellate attorney's fees. Pet. App. 26a-28a. When the district court has found that it is "not even . . . a close question" that a plaintiff's claim was objectively unreasonable, prevailing defendants should be encouraged to continue their defense on appeal by offering them some assurance that they will be able to collect an eventual award of appellate attorney's fees. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 561 (9th Cir. 1996) (awarding attorney's fees on appeal to successful defendant "inasmuch as it served the purposes of the Copyright Act for Fogerty to defend an appeal so that the district court's fee award would not be taken away from him"). When the plaintiff (like Adsani) is a foreign resident with no assets in the United States, the justification for requiring an appeal bond is even greater.

The facts of this case demonstrate why Rule 7 costs should include attorney's fees when the governing statute includes fees as part of the costs. Excluding attorney's fees and limiting the bond to routine taxable costs would deprive Rule 7 of meaningful protection as a security-for-costs provision, because attorney's fees are by far the largest single element of costs. In such cases, the security offered by a cost bond that excluded attorney's fees could hardly be called "security" at all.

III.

RULE 7, AS INTERPRETED BY THE COURT OF APPEALS, DOES NOT IMPERMISSIBLY BURDEN THE RIGHT TO APPEAL OR FRUSTRATE THE REVIEW PROCESS.

The court of appeals correctly interpreted Rule 7, and Adsani is wrong when she contends that the ruling would permit district courts to create an impermissible financial obstacle to appellate review of their own decisions. Pet. App. 21a-29a.

As the court observed, the right of appeal may be limited by statute requiring, for example, the posting of security for expenses, including appellate counsel fees, without violating principles of equal protection or due process. Pet. App. 24a, citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 551-52 (1949). The court correctly found that

> without any showing of her financial hardship, the bond imposed on Adsani is not an impermissible barrier to appeal and Adsani's arguments to the contrary should be rejected.

Pet. App. 27a.

Adsani misstates the record when she claims that she "could not afford" to post a supersedeas bond or is "unable" to post the Rule 7 bond, or makes similar claims. Pet. 4, 5. Both the district court and the court of appeals correctly noted that Adsani "failed to adduce credible evidence of an inability to pay." Pet. App. 28a.

Adsani did not oppose the $50,000 trial bond on the ground that she could not afford to post it. (She was permitted,

without opposition, to file the $40,000 increase in two installments, but she did not oppose the increase on hardship grounds or provide any evidence of hardship.) On the attorney's fees motion in the district court, defendants noted in their reply brief that Adsani's opposition papers had made no claim that she lacked the financial ability to respond to a substantial fee award and that she had even acknowledged (her brief, p. 10) that she "has devoted considerable resources to the prosecution of this action" (including four trips from London to New York for court appearances, and her prompt compliance with the trial bond orders). As an afterthought, she filed a belated and conclusory sur-reply declaration. But it lacked any proof or documentation of income, assets or financial circumstances, and thus warranted the district court's finding that

> given [Adsani's] complete failure to provide any specific information regarding [her] finances, nothing in [her] declaration convinces me that an award in the amount requested by the defendants would work an undue hardship on [her].

1996 WL 539780, *17; Pet. App. 22a-23a.

Moreover, in the district court, Adsani did not oppose the Rule 7 appeal bond on grounds of financial hardship. In fact, defendants' counsel's November 6, 1996 letter to the district court expressly noted that "nothing in [Adsani's counsel's] letter [opposing the Rule 7 bond] remotely suggests anything about [Adsani's] financial situation." Despite that open challenge, Adsani still submitted no financial information in the nearly two weeks remaining before the district court's Rule 7 bond order. Not until the appeal of the bond order did her counsel claim "hardship" on her behalf, but again with no evidence. Yet, in her reply brief on the Rule 7 appeal (p. 19 n.7), Adsani

acknowledged that before suit she "engaged a person experienced in publishing to assist in locating relevant witnesses in the United States, Saudia [*sic*] Arabia and Kuwait."

Adsani has devoted substantial resources to this litigation and continues to do so on the bond appeal, and nothing in the record evidences that she lacks the financial ability to post the bond. She did not file a supersedeas bond or seek a stay of enforcement of the judgment on the ground that she could not afford such bond. As a foreign resident with no assets in the United States, Adsani apparently felt she could ward off enforcement. In short, in Adsani's case, the district court's Rule 7 order plainly did not "create a financial obstacle to appellate review of its own decisions." Pet. 6.

As the court of appeals found, where Adsani did not pay the nearly $58,000 of fees that the trial bond left unsecured, and

> where Adsani has no assets in the United States and failed to adduce credible evidence of an inability to pay, the district court did not abuse its discretion nor violate Adsani's due process rights in imposing an appeal bond of $35,000.

Pet. App. 28a.

The court of appeals correctly ruled that Adsani's failure to show financial hardship also undermined her argument that the district court prejudged the case's chances on appeal and thus interfered with the review process. Pet. App. 28a-29a. Any cost bond (with or without fees) would necessarily reflect some judgment that appellant's appeal lacks merit or that appellant poses a payment risk. Rule 7 specifically assigns to the district court the discretion to impose a bond. But without a showing of financial hardship, there is no deterrent to appeal,

and thus no frustration of the review process. Moreover, the bond is not a direction to pay anything. An appellant like Adsani would have to pay "costs" only if she lost on appeal *and* the court of appeals awarded costs. Thus a Rule 7 bond does not award fees or other costs, but only requires security in case they are awarded under other rules or statutes.

Rule 7 bonds pose no greater "obstacle" than other bonds that concededly are valid. The supersedeas bond requirement to stay enforcement of a judgment during an appeal, Fed. R. Civ. P. 62(d), is no "financial obstacle to appeal," even though appellants who cannot afford to post them are more likely to be vulnerable to bargaining away their appeal rights in order to avoid or mitigate enforcement of the judgment.

Analogous rules providing for security for costs in district courts have been held to permit requiring security for attorney's fees. *See, e.g., Montserrat Overseas Holdings, S.A. v. Larsen*, 709 F.2d 22, 24 (9th Cir. 1983); *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 36-38 (S.D.N.Y. 1989) (Southern District of New York Civil Rule 39, now Rule 54.2, provides for a "bond for costs" or "security for costs," and those costs may include attorney's fees where a statute such as 17 U.S.C. § 505 provides for them); *Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) (same). District courts have long administered trial bonds, with no suggestion that they have used them as "financial obstacles" to deter or frustrate litigation of cases in the first instance. Moreover, trial bonds are usually imposed early in the case *before* there has been any determination of the merits, whereas Rule 7 bonds are permitted only *after* an appeal is taken and the district court has become thoroughly familiar with the merits of the case being appealed.

Where Congress has made the judgment that attorney's fees may be awarded "as part of the costs" on appeal (e.g., Section

505 of the Copyright Act), the district court should be permitted to require security for those potential costs. It is only reasonable "for the amount of the bond to track the amount the appellee stands to have reimbursed." Pet. App. 20a, 28a.

IV.

DISMISSAL WITH PREJUDICE OF THE MERITS APPEAL RENDERS THE RULE 7 BOND ISSUE MOOT.

The court of appeals ordered Adsani to comply with the Rule 7 order and post the bond required for her merits appeal by the end of July 1998, and directed that her failure to do so would result in the dismissal with prejudice of her merits appeal. Pet. App. 33a-34a. She did not seek from this Court a stay of either the Rule 7 bond order or the order dismissing her merits appeal if she failed to post the bond. Instead, she declined to post the bond and thus her merits appeal has been dismissed with prejudice. Pet. 5-6. But the termination of the parties' principal controversy renders the Rule 7 bond issue moot. There is no need to post a bond as security for costs in a proceeding that has been finally terminated.

Adsani claims that the dismissal of the appeal for failure to post the bond raises no issue of mootness because she was financially "unable" to post it and the order imposing the bond was invalid. Pet. 5-6 & n.2. She is wrong.

As shown above (e.g., Point III), both the district court and the court of appeals found that Adsani had submitted no credible evidence of inability to pay or financial hardship. Adsani did not seek to proceed in this Court *in forma pauperis* under Rule 39, because that would have required financial disclosures of the kind that she steadfastly avoided in the courts below. She cannot now assert her inability to pay as the basis

for ignoring a court order when she failed at every level — district court, court of appeals, and this Court — to present any evidence to support that assertion.

Adsani has chosen to abandon her merits appeal rather than post the bond, despite knowing that her bond to secure defendants' appellate attorney's fees would not be at risk unless she lost the appeal and the court of appeals awarded those fees. She was prepared to risk a judgment for defendants' appellate fees only if it was unsecured and she was secure in the knowledge that, as a foreign resident without assets in the United States, the judgment was uncollectable. In short, Adsani was willing to appeal if it was risk-free for her and if the defendants were the only ones at risk.

Adsani deliberately chose to end her merits appeal before the final outcome of her bond appeal. In so doing, she voluntarily declined to post the bond that would have preserved her right to appeal from the judgment dismissing her complaint. She cannot now claim financial inability to comply with the bond order when the record is barren of any credible evidence to support that claim. In the circumstances of this case, termination of the merits controversy necessarily ends the bond controversy through mootness.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

RICHARD DANNAY
Counsel of Record
COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Respondents
Jean P. Sasson, William Morrow and Company, Inc., Avon Books, The Hearst Corporation, and Bantam Doubleday Dell Publishing Group, Inc.
1133 Avenue of the Americas
New York, New York 10036
(212) 790-9200

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(3)

No. 98-157

In the
Supreme Court of the United States
OCTOBER TERM, 1997

FRIEDERIKE MONIKA ADSANI,

Petitioner,

vs.

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

GEORGE RUTHERGLEN
580 Massie Road
Charlottesville, Virginia 22903-1789
(804) 924-7015

ROBERT F. HERRMANN
Counsel of Record

CHERYL L. DAVIS
MENAKER & HERRMANN LLP
10 East 40th Street
New York, New York 10016
(212) 545-1900

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The Second Circuit's decision approving the inclusion of attorney's fees in an appeal bond has important implications for the federal judicial system, not just petitioner Adsani, and warrants review by this Court for at least three reasons:

- it enables district courts to create a financial obstacle to appeals from their own judgments, skewing the balance of power between the federal appellate and trial courts;
- it deepens a split in the circuits over the meaning of the term "costs" in Appellate Rules 7 and 39; and
- it obscures the guidance of this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), as to the scope of "costs" in procedural statutes.

Respondents Sasson and her publishers ("respondents") do not adequately consider these points in their opposition brief. They avoid altogether any mention of the first point: that district courts should not be able to transform the largely ministerial function of setting an appeal bond into a vehicle for limiting appellate review of their own decisions. Instead, respondents argue *ad hominem*, attacking Adsani on the extent of her showing of "financial hardship" (Resp. Br. at 21-23). Such a response is irrelevant to the issues before this Court.[1] The interpretation of Rule 7, and specifically whether district courts should be able to use it to insulate themselves from appellate review, is an institutional question basic to how our judicial system should

1. It is also inaccurate. Adsani was forced to sell her home in order to continue with the case. She was unable to post a supersedeas bond pending appeal, which allowed respondents to enforce their award of attorney's fees before the award could be reviewed. And now, because she has been unable to post the $35,000 Rule 7 bond, the Second Circuit has ordered that her deferred appeal on the merits must be dismissed.

function, not a matter of the financial means of any particular litigant.

Respondents' argument concerning supersedeas bonds and local rules permitting bonds in the district courts (Resp. Br. at 24) also ignores the basic institutional question. Such bonds operate solely within the confines of the district court and do not act as a direct bar to review. In contrast, the bond at issue here reaches beyond the district court to another avenue of potential redress for the litigant — the court of appeals. To allow the district court to become a gatekeeper on the route to appellate review, where the appeal is from the district court's own decisions, makes a mockery of the litigant's statutory *right* to such review. 28 U.S.C. §§ 1291, 1295; *see* App., 24a.

Respondents also are mistaken on the second point, the split in the circuits resulting from the lower court's interpretation of the term "costs" in Rules 7 and 39. Both the Third Circuit and the D.C. Circuit have stated categorically that because the "costs" to be bonded under Rule 7 are those defined in Rule 39, which does not include attorney's fees, Rule 7 does not authorize a bond to cover attorney's fees that may be assessed on appeal. *Hirschensohn v. Lawyers Title Ind. Corp.*, 1997 WL 307777 (3d Cir. 1997); *In re American President Lines*, 779 F.2d 714 (D.C. Cir. 1985).

The Second Circuit has now rejected those decisions in two respects. It denies that Rule 39 provides the definition of costs for Rule 7, or indeed a comprehensive definition of appellate costs at all (App., 17a-18a). And it holds that Rule 7 should be construed to allow security "for all of the funds to which [appellees] would be entitled after judgment in their favor" (App., 20a). These are propositions that place the Second Circuit sharply at odds with the Third Circuit and the D.C. Circuit. Moreover, the court's view of Rule 39 as not purporting to define costs but as simply concerning "procedures for taxing them" (App., 18a) places it in conflict with six other circuits that have held to the contrary (*see* Petition at 10).

Respondents are also wrong about Adsani's third point, which concerns the Second Circuit's misinterpretation of *Roadway Express* on the relationship between "costs" and attorney's fees. This Court in *Roadway Express* held that the term "costs" in 28 U.S.C. § 1927 does not include attorney's fees even where the underlying substantive statute permits a prevailing plaintiff to recover attorney's fees "as part of the costs." 447 U.S. 752, 757-58. This is because "costs" in section 1927 is to be measured by the definition of that term in 28 U.S.C. § 1920, a provision which must be read together with section 1927 as if they were an integrated procedural statute. 447 U.S. at 759-60. Thus, even if the underlying substantive statute permits an award of attorney's fees to a prevailing party "as part of the costs," as did the civil rights statutes at issue in *Roadway Express*, 42 U.S.C. §§ 1988, 2000e-5k, the term "costs" in the integrated procedural statute is not expanded to include attorney's fees.

Here, Adsani has shown in her Petition (at 13-14) that Rules 7 and 39 bear a relationship similar to that of sections 1927 and 1920, based on both the history and statutory purpose of those rules. Accordingly, attorney's fees are not included in the "costs" covered by Rule 7's bonding requirement even where an underlying substantive statute such as section 505 of the Copyright Act, 17 U.S.C. § 505, permits recovery of such fees "as part of the costs."

Respondents argue that Rules 7 and 39 should not be equated with sections 1927 and 1920, and that therefore *Marek v. Chesney*, 473 U.S. 752 (1985), should be applied to this case rather than *Roadway Express* (Resp. Br. at 16-18).[2] Critical to determining whether the provisions should be read together is the history of their adoption. As shown in Adsani's Petition (at 13-14), the

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2. Respondents acknowledge that *Marek* confirms the principle in *Roadway Express* "that the term 'costs' does not incorporate an attorney's fees provision in the underlying statute when the term comes with its own statutory definition." Resp. Br. at 18, citing *Marek*, 473 U.S. at 9 n.2.

Second Circuit's account of that history is simply wrong. Rule 7's bonding requirement does not post-date the 1909 adoption of the Copyright Act as the court below claimed (App. 15a), and therefore its authors cannot be assumed to have had the Copyright Act's attorney's fee provision in mind when the requirement was adopted. To the contrary, the statutory provisions from which Rule 7 emanates, like Rule 39, long predate the Copyright Act. Both incorporated the traditional "American rule" definition of "costs" that excluded attorney's fees (Petition at 14).

Respondents attack Adsani's historical account as "labored and misleading" (Resp. Br. at 18) but fail to identify any inaccuracy. The Second Circuit itself recognized the need to consider the history of the relevant procedural statutes to determine whether they stood on their own or incorporated the definition of costs from a substantive statute (App., 13a, 15a). Unfortunately, the Second Circuit misstated the history, and respondents' unreasoned endorsement of that view perpetuates an erroneous reading of the historical record.

Finally, respondents mistakenly argue that the dismissal of Adsani's merits appeal as a result of her failure to post the $35,000 bond will somehow render the bonding issue "moot" (Resp. Br. at 25-26). The argument reflects a misunderstanding of the doctrine of mootness and a basic misapprehension of what is at stake in this case. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Here the controversy is over whether an appeal bond in the amount of $35,000 (including prospective attorney's fees), the largest ever reported, should have been imposed as a precondition to an appeal on the merits. The dismissal of petitioner's appeal on the merits for failure to post bond does not diminish this controversy in any way. Indeed, it provides a concrete demonstration of how a district court can insulate its decisions on the merits from appellate review by imposing a massive bond.

Respondents assert, erroneously and without support in the record, that the issue is moot because Adsani has "chosen to abandon her merits appeal rather than post the bond" (Resp. Br. at 26). Even if the record were not clear, as it is, that this is a matter of inadequate means, not choice, respondents' argument would still be misguided. The petitioner's financial capacity is irrelevant to whether she has suffered adverse consequences from the order setting the appeal bond. She plainly has. These consequences are large and growing. The dismissal of petitioner's appeal now makes the order setting the appeal bond determinative of far more than the bonding issue itself. It now determines the outcome of this case on the merits. Respondents' mootness argument should be rejected.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, the Court should grant the writ.

Respectfully submitted,

ROBERT F. HERRMANN
Counsel of Record

CHERYL L. DAVIS
MENAKER & HERRMANN LLP
10 East 40th Street
New York, New York 10016
(212) 545-1900

GEORGE RUTHERGLEN
580 Massie Road
Charlottesville, Virginia 22903-1789
(804) 924-7015

Counsel for Petitioner

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